CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 100

THE UNITED STATES OF AMERICA, PETITIONER

vs.

JIMMIE IRA BROWN

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 28, 1947
CERTIORARI GRANTED OCTOBER 13, 1947

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1405

THE UNITED STATES OF AMERICA, PETITIONER

vs.

JIMMIE IRA BROWN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

INDEX

1 [Caption omitted.]

2 In the District Court of the United States of America for the Western District of Missouri, Southwestern Division

No. 1933

UNITED STATES OF AMERICA, PLAINTIFF

vs.

JIMMIE IRA BROWN, HULAN CECIL RUTLEDGE, DEFENDANTS

Indictment

Filed Dec. 28, 1945.

The grand jurors of the United States of America, duly and legally chosen, selected, summoned, and drawn from the body of the Western District of Missouri, and duly and legally empanelled, sworn, and charged to inquire of and concerning crimes and offenses against the United States of America within the Western District of Missouri, upon their oaths present and charge that Jimmie Ira Brown and Hulan Cecil Rutledge, on or about the 2d day of November 1945, at a point upon United States Highway No. 71, being about two and one-half miles South of Sheldon, Missouri, in the Southwestern Division of the Western Judicial District of Missouri, and within the jurisdiction of this Court, they, the said Jimmie Ira Brown and Hulan Cecil Rutledge being then and there in the custody of the Attorney General of the United States under judgment of conviction and sentence for having violated a law of the United States, and being then and there in the personal custody of the United States Marshal for the Western Judicial District of Arkansas, who was acting under orders of the Attorney General of the United States and was conducting and carrying them, the said Jimmie Ira Brown and Hulan Cecil

3 Rutledge, from Eldorado, Arkansas, through the State of Missouri, along and upon said Highway enroute from Eldorado, Arkansas, to the United States penitentiary at Leavenworth, Kansas, did knowingly, wilfully, unlawfully, and feloniously attempt to escape from such said custody;

Contrary to the provisions of Section 753h, of Title 18, of the United States Code, and against the peace and dignity of the United States of America.

EARL A. GRIMES,
Assistant United States Attorney.

A true bill:

H. A. MILLER,
Foreman of the Grand Jury.

Filed in the United States District Court on Dec. 28, 1945.

4 In the District Court of the United States of America For the Western District of Missouri, Southwestern Division

Order appointing counsel; motion to abate and denial thereof; waiver of arraignment and pleas

January 15, 1946

Now on this day comes the United States Attorney for the plaintiff, and also come the defendants herein in person and it appearing to the court that the defendants are without counsel and are unable to procure the same, it is ordered by the Court that Justin Ruark, a member of this bar, be and he is hereby appointed as counsel for the defendants as in such case made and provided. The defendants move to abate prosecution and to dismiss the case. Said motion is argued by counsel for the defendants and submitted to the court and by the Court overruled. The defendants waive formal arraignment and enter pleas of not guilty, and for cause shown (claimed insanity) the court refuses to accept said plea as to defendant Brown, and enters plea of not guilty for said defendant. Defendant Rutledge moves for severance. The case is set for trial on January 18, 1946 at 10:00 a. m. The Court appoints Mr. A. H. Garner as counsel for defendant Rutledge.

5 District Court of the United States, Southwestern Division, Western District of Missouri

No. 1933

UNITED STATES

v.

JIMMIE IRA BROWN

Criminal Indictment in One-Count for Violation of U. S. C., Title 18, Sec. 753–h

Judgment and commitment.

Filed Jan. 17, 1946

On this 17th day of January 1946, came the United States Attorney, and the defendant Jimmie Ira Brown, appearing in proper person, and by counsel and,

The defendant having been convicted on his plea of guilty of the offense charged in the indictment in the above-entitled cause, to wit: Did knowingly, wilfully, unlawfully, and feloniously attempt to escape from the custody of a United States Marshal while en route from Eldorado, Arkansas, to the United States Penitentiary at Leavenworth, Kansas, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered and adjudged that the defendant, having been found guilty of said offense, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of five (5) years to begin at the expiration of any sentence he is now serving, or to be served which was imposed prior to this date, without costs.

It is further ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) ALBERT A. RIDGE,
United States District Judge.

Approved as to form:

SAM M. WEAR, *U. S. Attorney.*

Filed in the U. S. District Court on the 17th day of Jan. 1946.

6 District Court of the United States

[Title omitted.]

Motion to vacate and/or set aside judgment and sentence

Filed Feb. 19, 1946

To the Honorable ALBERT A. RIDGE, *United States District Judge:*

Now comes, Jimmie Ira Brown, hereinafter called petitioner, and motions this Honorable Court to vacate and/or set aside judgment and sentence of petitioner only, in cause United States vs. Jimmie Ira Brown, et al., which cause petitioner was sentenced to (5) five years imprisonment.

The judgment of the case was in violation of the amendments to the constitution of the United States.

The petitioner attempted to escape from a United States Deputy Marshall and a guard while in route from El Dorado, Ark., to the Federal Penitentiary at Leavenworth, Kans. And upon arrival

of petitioner at the said penitentiary, he was called before the Institutional Court and was charged with attempt to escape from a United States Deputy Marshall and a guard while in route from El Dorado, Ark., to the Federal Penitentiary at Leavenworth, Kansas. The petitioner had not been committed to any institution at the time he attempted to escape, therefore he was not subject to any rules and regulations of any penitentiary or prison or institution, but the institutional court appointed Mr. H. C. Burgess to act as the petitioner's attorney and the court held a
7 regular trial and forfeited 480 days of the petitioner's good time on December 10, 1945.

Then on January 17, 1946, the petitioner was sentenced to (5) five years' imprisonment in this Honorable Court for the "same identical offense." This Honorable Court appointed Mr. Justin Ruark, to act as the petitioner's attorney, and, upon request of the petitioner, he made an oral motion to dismiss the case on the grounds of double jeopardy. But the motion was overruled on the grounds that the good time which the petitioner forfeited was not a constitutional right, because, when a convict is confined at the Federal Hospital for the insane at Springfield, Missouri, he would not receive any deduction from his sentence for good conduct, the petitioner was not in any hospital for the insane, and, he had not been committed to any kind of institution when he attempted to escape, and, he has never been in any hospital for the insane. Therefore, it was his constitutional right to have a deduction made from his sentence for good conduct while in the penitentiary.

When a prisoner has complied with provisions statute relating to deductions from sentence for good conduct, a good time allowance so earned become a matter of right, and he is entitled to reduction of maximum sentence. 18 U. S. C. A. 710, Douglas v. King, 110 F. 2d. 911.

When it was determined that prisoner was of unsound mind before expiration of his sentence, his case was taken out of operation of statute providing for deductions from sentence for good conduct and was governed by statute providing for transfer to hospital until restored to sanity, or until maximum sentence is served. 18 U. S. C. A. 710, Douglas v. King, 110 F. 2d. 911.

Where conditions under which prisoner's right to have deductions made from sentence for good conduct might become absolute had not occurred before determination of his mental un-
8 soundness, he was not deprived of any constitutional right by enforcement of statute providing for transfer to hospital until restored to sanity, or until max'mum sentence expires. 18 U. S. C. A. 710, 876, Douglas v. King, 110 F. 2d. 911.

PETITIONER'S CONCLUSIONS

There is consequently no escape from the conclusion that the petitioner was twice put in jeopardy, and if he was not twice in jeopardy for the same offence, the word jeopardy should be stricken from every book and record in the United States.

IDENTITY OF OFFENSES

The act of congress has made the judgments of the supreme court of the district of Columbia conclusive as to the question whether under the circumstances of the case a prisoner has or has not for the same offence been twice put in jeopardy of life or limb. Ex parte Bigelow (1885), 5 Sup. Ct. 542, 113 U. S. 328, 28 L. Ed. 1005.

Whether a conviction or acquittal under one indictment is a bar to a subsequent conviction or sentence under another depends, not or whether defendant has been tried for the same act, but whether he has been put in jeopardy for the identical offence. Ryan v. U. S. (C. C. A. 1914) 216 Fed. 13.

This prohibition is not against being twice punished, but against being twice in jeopardy, and the accused, whether convicted or acquitted, is equally put in jeopardy. Ball vs. U. S. (1896) 16 Sup. Ct. 1192, 1194, 163, U. S. 662, 41 L. Ed. 300; U. S. vs. Gilbert (C. C. 1834) Fed. Cas. No. 15, 204.

The petitioner did not have excess to these good time and jeopardy laws at the time of his trial and he requested his attorney to bring them into the court, and, he would not do so. The petitioner's attorney Mr. Justin Ruark, and the United States Prosecut-
9 ing Attorney, did, conspire, talk, and plan between themselves, to get the petitioner to withdraw his plea of not guilty and enter a guilty plea. They both promised the petitioner if he would enter a guilty plea he would not receive a longer sentence than one year and one day, and, that such sentence would run concurrently with the time he already had, and would not hurt him.

Therefore, the petitioner was deceived and coerced by his attorney and the prosecuting attorney into entering a guilty plea, and, therefore the petitioner was deprived of a constitutional right to assistance of counsel for his defense. U. S. C. A. Cost. Amend. 6—Walker vs. Johnson, 61 S. Ct. 574, reversing 109 F. 2d. 436.

The petitioner has a constitutional right to be present at every stage of his cause (Shields vs. United States, 273 U. S. 583, 46 S. Ct. 478), and the petitioner demands to be taken before the court for a hearing on this motion.

If a federal question is fairly presented by the record and its decision, it is necessary to the determination of the case a judg-

ment which rejects the claim, but avoids all reference to the federal question, is as much against the federal rights as though expressed in terms (Chapman vs. Goodman, 123 U. S. 340, 31 L. Ed. 235) same as above.

No particular form the words is necessary to be used in order that the federal question may said to be involved (Gree Bay, et Canal Co. vs. Pattin paper co., 172 U. S. 58, 43 L. Ed. 364).

The petitioner did not have any legal advise as to how this motion should be drawn up, and the has very little education. Therefore, he is asking the court to over look small mistakes which may be found herein.

10 That he believes his cause of action is meritorious, and that he is entitled to the redress he seeks in said action.

Wherefore, petitioner respectfully prays that the judgment and sentence be vacated and/or set aside as prayed for.

Respectfully submitted.

Jimmie Ira Brown,
JIMMIE IRA BROWN,
Petitioner.

[*Duly sworn to by Jimmie Ira Brown; jurat omitted in printing.*]

11 In the District Court of the United States for the Western District of Missouri, Southwestern Division

[Title omitted.]

Order overruling motion to vacate judgment and sentence

Filed April 19, 1946

Now on this day the separate applications of the above-named defendants to obtain copy of the indictment and commitment filed herein, without paying or securing costs thereof is, by the Court, sustained and the Clerk is ordered to forward to said defendants a copy of said documents.

The Court, having considered the motion of the defendant Jimmie Ira Brown to vacate and set aside the judgment and sentence heretofore entered and imposed herein and being fully advised in the premises thereof, said motion is, by the Court, overruled.

ALBERT A. RIDGE, *Judge.*

Dated at Kansas City, Missouri, this 18th day of April 1946.

12 District Court of the United States, Western District of Missouri, Southwestern Division

[Title omitted.]

Notice of appeal

Filed May 15, 1946

Notice is hereby given, and defendant, Jimmie Ira Brown does hereby take an appeal to the United States Circuit Court of Appeals, in and for the Eighth Circuit, from the orders and judgments of the United States District Court, the Honorable Judge Albert A. Ridge, presiding Justice, in and for the Western District of Missouri, Southwestern Division at Joplin, Missouri, from an order dismissing the motion to vacate and/or set aside judgment and sentence, and supporting brief, and refusal to grant said motion, made and entered against defendant herein on the 18th day of April 1946.

Jimmie Ira Brown,
JIMMIE IRA BROWN,
Appellant, in propria persona.

[*Duly sworn to by Jimmie Ira Brown; jurat omitted in printing.*]

13 District Court of the United States, Western District of Missouri, Southwestern Division

[Title omitted.]

Motion for leave to proceed in forma pauperis on appeal

Filed May 15, 1946

Now comes, Jimmie Ira Brown, the defendant named and respectfully moves this Honorable Court for permission and leave to proceed in forma pauperis in taking of an appeal, and appealing to the United States Circuit Court of Appeals, in and for the Eighth Circuit without payment of costs and fees of court, and without cost of printing the records.

This motion is based upon the affidavit of forma pauperis annexed and made part of this motion.

JIMMIE IRA BROWN, *Appellant.*

[*Duly sworn to by Jimmie Ira Brown; jurat omitted in printing.*]

14 District Court of the United States, Western District of Missouri, Southwestern Division

[Title omitted.]

Affidavit in forma pauperis

Filed May 15, 1946

Jimmie Ira Brown, being duly sworn deposes and says; that he is the petitioner in the above entitled matter. That he desires to appeal from an order dismissing the issuance of a motion to vacate and/or set aside judgment and sentence by the above entitled court to the United States Circuit Court of Appeals, in and for the Eighth Circuit.

That he believes and states: that he has good and meritorious groun's for persecuting said appeal to said appellate court. That affiant has not sufficient money or means sufficient to prosecute said appeal to said Appellate Court. That affiant is a citizen of the United States. That affiant is without sufficient money or means to pay the costs of court and costs of printing records and briefs on appeal, that affiant has no property with which to secure the payment of said costs of appeal. That affiant has no person who is sufficiently interested in his case that will pay the cost for him.

Wherefore, affiant prays that an order be issued by this court, allowing and permitting affiant to take and perfect said appeal and to prosecute the same before said appellate court, without the payment of fees and costs, and to have typewritten the records of appeal and such other documents pertaining thereto.

JIMMIE IRA BROWN, *Petitioner.*

Subscribed and sworn to before me this 3rd day of May, 1946.

[SEAL] EDWARD O. DOUGHTY,
Notary Public.

My Commission Expires May 21, 1949.

Filed in the U. S. District Court on the 15th day of May 1946.

15 District Court of the United States, Western District of Missouri, Southwestern Division

[Title omitted.]

Praceipe for record

May 15, 1946

To the Clerk of the above entitled Court:

It is requested that in the above entitled case, for the taking of an appeal to the United States Circuit Court of Appeals, in and for

the Eighth Circuit, you prepare, and proceed in accordance with the rules promulgated by the United States Supreme Court, the following documents, to wit:

A transcript of the records, in which includes:

a. Motions to vacate and/or set aside judgment and sentence, and supporting brief.

b. Findings of the court. Memorandum.

c. The order of the court denying the motion to vacate and/or set aside judgment and sentence, and supporting brief.

d. Notice of appeal.

e. Order for leave to appeal in forma pauperis.

f. Affidavit in forma pauperis.

g. Assignment of errors.

JIMMIE IRA BROWN,
Appellant—pro-se.

[*Duly sworn to by Jimmie Ira Brown; jurat omitted in printing.*]

16 District Court of the United States, Western District of Missouri, Southwestern Division

[Title omitted.]

Assignment of errors

Filed May 15, 1946

The defendant assigns as errors, the following: The court erred in denying the motion to vacate and/or set aside judgment and sentence and in dismissing the same, for the reason that said motion alleges sufficient facts showing that defendant is illegally confined under a void judgment and sentence.

2. The court erred in denying the motion to vacate and/or set aside judgment and sentence and in dismissing the same, for the reason that the defendant is entitled to his relief sought by said motion.

The court erred in denying the motion to vacate and/or set aside judgment and sentence and in dismissing the same, for the reason that the defendant's fundamental and constitutional rights have been violated.

The court erred in denying the motion to vacate and/or set aside judgment and sentence and in dismissing the same, for the reason that the jurisdiction of a federal court must be certain; it can not be assumed nor presumed.

Respectfully submitted.

JIMMIE IRA BROWN,
Defendant in proper person.

17 In the District Court of the United States for the Western District of Missouri, Southwestern Division

[Title omitted.]

Order denying petition to appeal in forma pauperis

Filed May 15, 1946

On this day there is presented to the Court, the petition of the above-named appellant, praying for an Order of Court permitting him to appeal from a judgment of this court, heretofore entered in forma pauperis.

The Court having read and considered said petition and finding that there are no grounds stated in said petition that would justify an appeal, the Court finds no merit in an appeal from said judgment aforesaid.

It is therefore ordered by the Court that the petition for appeal in forma pauperis, in the above-stated case, be, and the same hereby is, denied.

Dated at Kansas City, Missouri, this the 14th day of May 1946.

ALBERT A. RIDGE, *Judge.*

18 District Court of the United States, Western District of Missouri, Southwestern Division

[Title omitted.]

Exhibit "A"—Motion to correct sentence

To the Honorable ALBERT A. RIDGE, *United States District Judge:*

Comes now, Jimmie Ira Brown, defendant in the above-described and numbered cause, and moves this Honorable Court to vacate the sentence heretofore imposed on criminal case No. 1932, as being erroneous, incorrect, and illegal, the grounds therefore being hereinafter fully set forth.

JURISDICTION

The jurisdiction of this Honorable Court is hereby invoked under authority of the U. S. Circuit Court of Appeals for the Tenth Circuit, in Gilmore vs. U. S., 124 Fed. (2d) 537, and the authority of the Supreme Court of the United States, cited herein, among numerous authorities in point.

STATEMENTS OF FACTS

Defendant has been sentenced as follows:

1. On criminal case No. 840, El Dorado, Arkansas, October 26, 1945, one (1) year from this date on the second count, and for a period of two (2) years on the first count to begin at the expiration of the sentence pronounced on the second count; making a total of three (3) years imprisonment in this case.

2. On criminal case No. 839, El Dorado, Arkansas, October 26, 1945, sentence of two (2) years, to begin at the expiration of the sentence adjudged on this day by the court against said defendant on the first count of criminal case No. 840.

19 3. On criminal case No. 1933, at Joplin, Missouri, January 17, 1946, sentence of five (5) years for an attempted escape, 18 U. S. C. A. Sec. 753h, to begin at the expiration of any sentence he is now serving, or to be served which was imposed prior to this date, without cost.

CONTENTIONS, GROUNDS FOR MOTION

Defendant's contentions are that the five (5) year sentence imposed upon his in criminal case No. 1933 for violating the federal escape act in this court, as referred to above, is illegal and void for the reason that it does not comply with the statutory requirements of the escape act, 18 U. S. C. A. Sec. 753h; i. e. the sentence, in order to conform to the requirements of the act, would begin to run at the expiration of, or legal release from, the sentence defendant was being held under at the time he attempted to escape, that is, the first, or one year sentence imposed in Arkansas. (To make it clear) defendant was being held under the first, or one year sentence imposed in Arkansas when he attempted to escape, and was not being held under the other two sentences imposed in Arkansas when he attempted to escape.

There being distinct or difference in the fact that such sentences were imposed upon him, and that fact that he was not being held under actual and constructive rendition servitude of sentence of the second and third sentences.

The provisions of the statute under which defendant relies reads as follows: 18 U. S. C. A. Sec. 753h, "If such person be under sentence at the time of such offense, the sentence imposed hereunder shall begin upon the expiration of, or legal release from, any sentence under which such person is held at the time of such escape or attempt escape."

ARGUMENT

To support his contentions, defendant submits argument and reasoning of other courts, the escape act itself provides, the sentence

imposed hereunder shall begin upon the expiration of, or legal release from, the sentence being served at the time of the offense. 18 U. S. C. A. Sec. 753h.

20 Now, the fifth Circuit Court of Appeals, and the Tenth Circuit Court of Appeals in re: Rutledge vs. U. S., 146 F. (2d) 199; Thomas vs. Hunter, 153 Fed. (2d) 834; McMahan vs. Hunter, 150 F. (2d) 498, continuing these provisions of the act, declared that it is clear the escape sentence is a separate and independent sentence, and in offense, that it is mandatory that the sentence imposed for an escape or attempted escape shall begin at the expiration of, or legal release from. The sentence being served at the time of such offense.

The defendants first sentence, the one year sentence was imposed for an attempted escape, 18 U. S. C. A. Sec. 753h, and is separate from his other two sentences imposed in Ark., for that reason it would have been impossible for defendant to have been held on, or under the authority of any sentence except the one year sentence he was serving when he attempted to escape. For these reasons, the five (5) year sentence imposed upon defendant in this court for violating the federal escape act, should begin to run at the expiration of, or legal release from, the one year sentence which defendant was serving when he attempted to escape, and not at the expiration of all three sentences imposed in Arkansas.

If Congress had intended to require that the sentence for an escape or attempt escape should run consecutively to all sentence imposed prior to the offense, it would undoub'tly have employed language plainly expressive of that intent; indeed such language was not used in connection with escape attempted after the imposition of several consecutive sentences.

THE FINAL RULE

All authorities support the settled rule that uncertainties must be resolved in favor of the defendant and his personal liberty.

PRAYER

Wherefore, good and sufficient cause having been shown in the foregoing, both in law and in facts, defendant moves this
21 Honorable Court, to set aside its pronounced sentence in criminal case No. 1933, and render and pronounce a new judgment in the said cause, in its proper and legal form.

JIMMIE IRA BROWN, *Movant.*

[*Duly sworn to by Jimmie Ira Brown; jurat omitted in printing.*]

22 District Court of the United States, Western District of Missouri, Southwestern Division

Affidavit in forma pauperis

STATE OF KANSAS,
County of Leavenworth, ss:

Personally appeared before me this date Jimmie Ira Brown, and being first by me duly sworn, upon his oath, deposes and says; that he is a citizen of the United States of America, and the defendant in the motion to correct sentence in criminal case No. 1933, that he verily believes he has a meritorious cause of action, that it is brought in good faith, and that he believes he is entitled to the redress he seeks herein.

But that because of his poverty he is unable to pay the cost of prosecuting the same, or to furnish security in lieu thereof; Section 832, Title 18 U. S. C. A., U. S. Ex rel Extabrook vs. Otis (8th) Circuit Court.

Wherefore defendant respectfully prays that he be by this court permitted to bring and to prosecute this said suit or action as a poor person.

JIMMIE IRA BROWN,
Defendant—Movant Pro-Per.

Subscribed and sworn to before me this 19th day of July 1946.

[SEAL] FRANK A. ROBERTS,
Notary Public.

My commission expires 2/28/48.

23 *Exhibit "A" to motion*

Indictment in two counts: Section 88, T. 18, U. S. C. A., Section 753h, T. 18, U. S. C. A.

UNITED STATES OF AMERICA,
Western District of Arkansas, Texarkana Division, ss:

In the District Court of the United States, in and for the Western District aforesaid, at the May Adjourned Term thereof, A. D. 1945.

The Grand Jurors of the United States, impaneled, sworn, and charged to inquire into offenses committed in the Western District of Arkansas, at the Term aforesaid, on their oath aforesaid, do hereby present and charge, that before the committing of the several offenses in this indictment mentioned, Hulan Cecil Rutledge, who has also been known under aliases C. H. Rutledge, H. J. Rutledge, James Cecil Rutledge, J. B. Adair, Hulan James Cecil Rutledge, James C. Love, "Peewee,"; Jimmie Ira Brown, who has

also been known under aliases Jimmie Brown, James Stroud, and Michael Doil Woolsey, hereinafter in the several counts of this indictment call defendants, then and there well knowing the facts set forth in this indictment, did on or about July 1, 1945, in the El Dorado Division of said District, and within the jurisdiction of said Court, devise a scheme and artifice to effect the escape of the defendants Hulan Cecil Rutledge and Jimmie Ira Brown from the County Jail of Union County, Arkansas, at El Dorado, Arkansas, in said County, said scheme and artifice being in substance and effect as follows, to wit:

That the said defendant Michael Doil Woolsey, being then and there imprisoned in said county jail of Union County,
24 Arkansas, upon his release from said jail would procure and bring to and introduce into said county jail of Union County, Arkansas, hack saw blades to be used by the said defendants Rutledge and Brown in sawing the bars of the cell in said jail wherein the said defendants Rutledge and Brown were imprisoned, whereby said defendants Rutledge and Brown would be enabled to pass through the opening thereby made and so escape from said Union County jail, the said defendant Rutledge being then and there imprisoned and confined therein in the custody of the Attorney General of the United States under and by virtue of a conditional release violator's warrant duly issued by the United States Board of Parole at Washington in the District of Columbia, on or about July 9, 1945, and the said defendant Brown being then and there imprisoned and confined in said jail by virtue of certain process under the laws of the United States by judgment of John G. Ragsdale, as United States Commissioner for the Western District of Arkansas, in the El Dorado Division as aforesaid, whereby the said defendant Brown was bound over to await the action of the Grand Jury of the United States to be next impaneled and convened in said Western District of Arkansas, upon a charge that he, the said Jimmie Ira Brown, had violated Section 408 of Title 18, United States Code Annotated, by transporting in interstate commerce a certain automobile knowing the same to be stolen from the owner thereof, said order committing the said defendant Brown having been made and entered on June 29, 1945.

That the said defendants, and each of them, did unlawfully, knowingly, and feloniously combine, agree, and conspire among themselves and with each other that the said defendant Michael Doil Woolsey would, upon his release from said Union County Jail as aforesaid, procure and bring to said jail and introduce and cause to be introduced therein certain hack saw blades with the
25 intent and purpose of enabling the said defendants Rutledge and Brown to escape from said jail.

That having devised said scheme and conspiracy to procure and effect the escape of the said defendants Rutledge and Brown, the said defendant Michael Doil Woolsey, for the purpose of executing and carrying out the same, did unlawfully, knowingly, and feloniously commit certain overt acts in that the said defendant Michael Doil Woolsey, on or about July 3, 1945, procure certain hack saw blades and bring the same to the County Jail of Union County, Arkansas, at El Dorado, and cause the same to be delivered to the said defendants Rutledge and Brown, and that the said defendants Rutledge and Brown used said hack saw blades in sawing the bars of the cell in said jail in which the said defendant Rutledge and Brown were confined and thereby attempted to escape from said jail, all of which is contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

COUNT TWO

And the Grand Jurors aforesaid, on their oath aforesaid, do further present and charge, that the said Hulan Cecil Rutledge, with aliases, and Jimmie Ira Brown, with aliases, on or about the 3rd day of July 1945, being in the custody of the Sheriff of Union County, State of Arkansas, and confined in said jail as more fully described and set forth in count one of this indictment, all of said count one being fully and completely adopted as part of this count of this indictment the same as if all of the allegations of the said count one were fully copied and set forth herein, did unlawfully and feloniously attempt to escape from such custody and
26 confinement by sawing with hack saw blades and attempting to sever the bars of said jail, with the intent and purpose on the part of said defendants to effect an opening in said bars through which the said defendants might pass and escape from said jail, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

Clinton R. Barry,
CLINTON R. BARRY,
United States Attorney.

No. 840. United States District Court. Western District of Arkansas Texarkana Division. The United States of America vs. Hulan Cecil Rutledge, Jimmie Ira Brown, Michael Doil Woolsey. Indictment. 2 cts. Sec. 88 T. 18 U. S. C. A., Sec. 753h T. 18 U. S. C. A. A true bill. Roy W. Davis, Foreman. Filed Aug. 28, 1945. Truss Russell, Clerk, by S. A. Phillips, Deputy Clerk.

745463—47——3

27 District Court of the United States, Western District of Arkansas, Eldorado Division

No. 840

UNITED STATES

v.

JIMMIE IRA BROWN

Criminal in Two Counts for Violation of U. S. C., Title 18, Secs. 88 and 753h

On this 26th day of October 1945, came the United States Attorney and the defendant, Jimmie Ira Brown, appearing in proper person, and by S. E. Gilliam, his attorney, and,

The defendant having been convicted on his plea of guilty of the offense charged in the indictment in the above-entitled cause, to wit: Count 1: Conspiring with Hulan Cecil Rutledge and Michael Doil Woolsey, on or about July 1, 1945, to effect the escape of Hulen Cecil Rutledge and of himself from Union County Jail, at El Dorado, Arkansas, wherein they were incarcerated; Count 2: On or about July 3, 1945, unlawfully attempt to escape from said jail by sawing with hack saw blades and attempting to sever the bars of said jail; and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against , and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered and adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of one (1) year from this date on the second count of the indictment in this cause, and for the period of two (2) years on the first count of the indictment, to begin at the expiration of the sentence of imprisonment herein adjudged on the second count; making a total of three years imprisonment on the indictment in this case.

It is further ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) JNO. E. MILLER,
United States District Judge.

28 District Court of the United States, Western District of Arkansas, Eldorado Division

Criminal Case No. 840

UNITED STATES

vs.

JIMMIE IRA BROWN (ET AL.)

Docket Entries pertaining to defendant Brown

8-28-45—Indictment returned by Grand Jury in Texarkana Division, ordered docketed in El Dorado Div'n for prosecution.

8-28-45—Ordered that Capias issue upon application of U. S. Atty.

10-15-45—Defendants Brown and Rutledge request assignment of counsel. S. E. Gilliam appointed atty. for Brown.

10-15-45—Defts. Brown and Rutledge waive arraignment and plead not guilty to each of the 2 counts, and are remanded to jail.

10-15-45—Trial of case for all defts. set for Oct. 22, 1945.

10-15-45—Prec. for Subp. filed.

10-15-45—Subp. for writs on behalf of U. S. retnb. 10-22-45 issued, with one copy and mailed to Marshal at Jackson, Miss.

10-15-45—Subpoena for witnesses on behalf of U. S. returnable 10-22-45, issued with 4 copies and mailed to Marshall at Jackson, Miss.

10-15-45—Praecipe for subpoena filed.

10-15-45—3 subpoenas for U. S. witnesses returnable 10-22-45 issued with 4 copies and delivered to marshal.

10-19-45—Prec. for subpoenas for witnesses on behalf of defendant James Ira Brown, filed by S. E. Gilliam, his attorney.

10-19-45—Subpoena for witnesses on behalf of deft. James Ira Brown returnable 10-22-45 issued with copy and delivered to marshal.

10-19-45—Subpoena for witnesses on behalf of James Ira Brown returnable 10-22-45 issued with copy and mailed to marshal at Jackson, Miss.

10-19-45—Subpoena for witnesses on behalf of deft. James Ira Brown returnable 10-22-45 issued with copy and mailed to marshal at Shreveport, La.

10–19–45—Subpoena for witnesses on behalf of deft. Ira Brown returnable 10–22–45 issued with copy and mailed to marshal at Dallas, Texas.

10–22–45—Defendant Brown in person and by counsel withdraws plea of not guilty and enter plea of guilty to both counts.

10–22–45—Deft. Rutledge in person and by counsel withdraws plea of not guilty and enters plea of guilty to both counts.

10–22–45—Court accepts above pleas of guilty after advising defts. of possible maximum penalty upon conviction and after defendants repeated their respective plea of guilty.

10–22–45—Defendants remanded to jail to await sentence.

10–24–45—1 plaintiff's witness subpoena returned as executed, filed.

10–26–45—Judgment—Defendant Brown: ct. 2—Custody of Attorney General for one year from this date for imprisonment. Ct. 1—Custody of Attorney General for imprisonment for 2 years, to begin at the expiration of sentence adjudged on 2d count. Judgment and commitment filed. 2 certified copies of Judgment and commitment delivered to marshal.

11– 1–45—To filing 2 defendants witness subpoenas returned unexecuted.

11– 7–45—Mittimus as to defendant Jimmie Ira Brown returned as executed, filed.

11–30–45—Reporter's transcript of proceedings with original stenographic notes attached, filed together with proceedings and notes in criminal cases Nos. 834 and 839.

1–30–46—Application of deft. Brown to obtain court records without paying costs or securing costs thereof to wit: Certified copy of indictment, Judgment, and commitment, and docket entry, filed.

1–30–46—Order directing defendant Brown be furnished with certified copies of indictment, Judgment, and Commitment, and docket entries. Order filed.

29 UNITED STATES OF AMERICA,
Western District of Arkansas, ss:

I, Truss Russell, Clerk of the United States District Court in and for the Western District of Arkansas, do hereby certify that the annexed and foregoing is a true and full copy of the original indictment filed August 28, 1945, in Criminal case No. 840, United States of America vs. Hulan Cecil Rutledge, Jimmie Ira Brown, and Michael Doil Woolsey, and Judgment and Commitment, en-

tered October 26, 1945, as to defendant Brown, and docket entries pertaining to defendant Brown, in said Criminal Case No. 840, as they appear on file and as of record in *Eldorado* Division of said district.

In testimony whereof, I have hereunto subscribed by name and affixed the seal of the aforesaid Court at Fort Smith, Arkansas, this 5th day of February A. D. 1946.

[SEAL] TRUSS RUSSELL,
Clerk.
By E. A. Riddle,
E. A. RIDDLE,
Deputy Clerk.

30 *Exhibit "B" to motion*

UNITED STATES OF AMERICA,
Western District of Arkansas, Texarkana Division, ss:

In the District Court of the United States, in and for the Western District aforesaid, at the May Adjourned Term thereof, A. D. 1945.

The Grand Jurors of the United States, impaneled, sworn, and charged as the Term aforesaid, of the Court aforesaid, on their oath present, that Jimmie Ira Brown and Hulan Cecil Rutledge on or about the 17th day of June, in the year of our Lord nineteen hundred & forty-five, in the Eldorado Division of said District and within the jurisdiction of said Court, did unlawfully, knowingly, wilfully, and feloniously transport in interstate commerce from the City of Vicksburg, in the State of Mississippi, to the Town of Bearden, in the State of Arkansas, a certain motor vehicle, to wit, one 1937 Ford Coach automobile, motor number 18-37001537, the personal property of Henry P. Williams, which had theretofore been stolen, taken, and driven away without the consent of the owner and with intent to deprive the said owner thereof, said defendants at the time of so transporting said motor vehicle in interstate commerce as aforesaid, well knowing that the same had been stolen, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

CLINTON R. BARRY,
United States Attorney.
[S] Thomas C. Pitts,
By THOMAS C. PITTS,
Assistant United States Attorney.

No. 839. District Court of the United States, Western District of Arkansas. The United States vs. Jimmie Ira Brown, Hulan Cecil Ruthledge. Indictment. 1 ct. Sec. 408, T. 18, U. S. C. A. A true bill, Roy W. Davis, Foreman. Filed Aug. 28, 1945. Truss Russell, Clerk. By S. A. Phillips, Deputy Clerk.

31 District Court of the United States, Western District of Arkansas, El Dorado Division

No. 839

Criminal in One Count for Violation of U. S. C., Title 18, Secs. 408

UNITED STATES

v.

JIMMIE IRA BROWN

On this 26th day of October 1945, came the United States Attorney, and the defendant Jimmie Ira Brown appearing in proper person, and by S. E. Gilliam, his attorney, and,

The defendant having been convicted on his plea of guilty of the offense charged in the indictment in the above-entitled cause, to wit: Transporting in interstate commerce, or or about June 17, 1945, and from Vicksburg, in the State of Mississippi, to Bearden, in the State of Arkansas, one 1937 Ford Coach automobile, motor No. 18-3700153, the personal property of Henry P. Williams, knowing at the time of such transportation that said automobile had been theretofore stolen, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered and adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of two (2) years, to begin at the expiration of the sentence of imprisonment adjudged on this day by the court against said defendant on the first count of the indictment in Case No. 840.

It is further ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other

qualified officer and that the same shall serve as the commitment herein.

(Signed) JNO. E. MILLER,
United States District Judge.

A true copy filed this 26th day of October 1945.

(Signed) TRUSS RUSSELL,
Clerk.

(By) (S) S. A. Phillips,
S. A. PHILLIPS,
Deputy Clerk.

32 District Court of the United States, Western District of Arkansas, El Dorado Division

No. 839 Crim. Indictment in On Count for Violation of U. S. C. Title 18, Sec. 408

UNITED STATES

vs.

JIMMIE IRA BROWN, ET AL.

DOCKET ENTRIES

Aug. 28, 1945—Indictment returned.

Oct. 15, 1945—Defendant Jimmie Ira Brown waived counsel in this case (after requesting and having been granted counsel in cases 834 and 840) and was arraigned and plead guilty. Defendant Brown is remanded to jail to await sentence.

Oct. 15, 1945—Walter L. Brown appointed attorney for defendant Hulan C. Ruthledge.

Oct. 15, 1945—Defendant Hulan C. Ruthledge waived arraignment and plead not guilty and is remanded to jail to await trial on October 22, 1945.

Oct. 22, 1945—Nolle prosequi as to defendant Hulan C. Ruthledge.

Oct. 26, 1945—Judgment: Defendant Jimmie Ira Brown: Custody of the Attorney General for imprisonment for 2 years, to begin at the expiration of sentence adjudged on count 1 of the indictment in case 840 Crim. Judgment and commitment filed. 2 certified copies of Judgment and commitment delivered to U. S. Marshal.

Nov. 7, 1945—To fil mittimus returned as executed.

Nov. 30, 1945—Court Reporter's original notes and transcript of proceedings as to both defendants filed and lodged in Case No. 840.

33 UNITED STATES OF AMERICA,
Western District of Arkansas, ss:

I, Truss Russell, Clerk of the United States District Court in and for the Western District of Arkansas, do hereby certify that the annexed and foregoing is a true and full copy of the original Indictment, Judgment, and Commitment and Docket Entries in Criminal Case No. 839—United States vs. Jimmie Ira Brown, and now remaining among the records of the said Court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at El Dorado, Arkansas this 21st day of February A. D. 1946.

[SEAL]

TRUSS RUSSELL,
Clerk.
By OLIVE W. SOUTHWARD,
Deputy Clerk.

34 In the District Court of the United States for the Western District of Missouri, Southwestern Division

No. 1933

UNITED STATES OF AMERICA, PLAINTIFF

v.

JIMMIE IRA BROWN, DEFENDANT

Memorandum opinion

Filed Aug. 23, 1946

The *Federal Escape Act, 18 U. S. C. A., Sec. 753h*, provides that any person committed to the custody of the Attorney General, or his authorized representative who, after "conviction for any offense whatsoever" escapes, or attempts to escape, from such custody shall be guilty of an offense, and that "if such person be under sentence at the time of such offense, the sentence imposed" for the escape "shall begin upon the expiration of, or upon legal release from, *any* sentence under which such person is held at the time of such escape or attempt to escape." [Italics supplied.]

On October 26, 1945, defendant Jimmie Ira Brown, on his plea of guilty to three separate charges, contained in two indictments, was sentenced by the United States District Court, Western District of Arkansas, El Dorado Division, for a total of five years' imprisonment. The sentences imposed under the indictment containing two such charges, reads as follows:

"One year from this date on the Second Count and for a period of two years on the First Count to begin at the expiration of the

sentence pronounced on the Second Count, making a total of three years' imprisonment in this case."

35 For the offense charged in the second indictment, the sentence pronounced by the Court was as follows:

"* * * two years to begin at the expiration of the sentence adjudged on this day by the Court against said defendant on the First Count of Criminal Case No. 840."

On November 2, 1945, while defendant was in the custody of two United States Marshals, being conducted through the State of Missouri to Leavenworth Penitentiary, and while within the jurisdiction of this Court, the defendant and another prisoner attempted to escape from such custody, by force and putting the lives of said Marshals in imminent peril. On his plea of guilty to an indictment returned against defendant charging a violation of Sec. 753h, he was sentenced to five years in the custody of the Attorney General of the United States. The judgment imposing said sentence, reads in part as follows:

"Five years to begin at the expiration of any sentence he is now serving, or to be served which was imposed prior to this date, without costs."

Defendant has filed motion to correct the last-referred to sentence, contending the same to be erroneous, incorrect, and illegal. As grounds for said motion defendant alleges that the five-year sentence imposed upon him, for violating the Federal Escape Act, does not comply with the statutory requirements of said Act in that said sentence should have been made to commence at the termination of the one-year sentence first imposed upon defendant by the United States District Court in Arkansas, and not at the termination of the accumulative sentences imposed upon him by said Court prior to his attempted escape. In support of such

36 contention defendant submits the following argument: The first sentence imposed upon him was a one-year sentence and at the time he attempted to escape he was in the custody of the officers transporting him to Leavenworth Penitentiary under said sentence; that said sentence had begun to run (under T. 18, U. S. C. A., Sec. 709a) while he was in jail awaiting transportation to the Penitentiary. Under such circumstance defendant asserts "it would have been impossible for defendant to have been" in custody "under the authority of any sentence except the one-year sentence he was serving when he attempted to escape." So reasoning, defendant says that the five-year sentence, imposed upon him by this Court for violation of the Federal Escape Act, "should begin to run at the expiration of, or legal release from, the one-year sentence which defendant was serving when he attempted to

escape and not at the expiration of all three sentences imposed in Arkansas."

In support of such contention defendant relies upon the cases of Rutledge v. U. S., 146 F. (2d) 199; Thomas v. Hunter, 153 F. (2d) 834; McMahan v. Hunter, 150 F. (2d) 498 and Gilmore v. U. S., 124 F. (2d) 537. The authorities so cited by defendant do not substantiate the contention here made. In the Rutledge case, supra, defendant was convicted of an attempted escape from official custody before imposition of any sentence against him. The ruling of the Rutledge case is that, under such circumstances the Court may assess a sentence under Sec. 753h, supra, and order it to run concurrently with another sentence. In Thomas
37 v. Hunter, supra, while petitioner was on parole from a previous conviction he was arrested and charged, in an indictment, with violation of the Dyer Act, 18 U. S. C. A., Sec. 408. While in the custody of the Marshal he attempted, on two occasions, to escape. He was indicted in separate indictments for each of these attempted escapes. He pleaded guilty to the charge under the Dyer Act and was tried and found guilty by a jury in each of the attempted escape cases. He was sentenced to serve a term of four years on the Dyer Act violation and to an additional sentence of five years each on the two escape charges. The sentences were made to run consecutively, for a total term of fourteen years. Petitioner, in Thomas v. Hunter, supra, contended that the sentences imposed upon him for the two attempted escapes should have been made to commence to run at the termination of the sentence for the offense which he had committed prior to the commission of the Dyer Act offense, and for which, at the time of his arrest, he was out on parole. The Court there held that the sentences imposed on petitioner for the attempted escapes could be made to begin to run from the completion of the sentence for the crime committed by petitioner while on parole. The Court there said:

"Where one is confined and actually serving a prior sentence when he escapes from custody, then the sentence for such escape must be fixed with relation to the expiration date of the prior sentence or with reference to the date on which one is thereafter legally released from confinement thereunder."

The effect of the holding in the Thomas case, supra, is contrary to the contention here made by the defendant. In Mc-
38 Mahan v. Hunter, supra, defendant was held under a three-year sentence imposed for violation of the Dyer Act and brought habeas corpus proceedings, attacking two separate sentences of two years each, imposed for violations under the Federal Escape Act. The sentences imposed for violation of the Federal

Escape Act were, by their express terms, made to run consecutively after the sentence imposed for violation of the Dyer Act. The total term of such sentences was seven years' imprisonment. The Court, in the McMahan case, did not pass upon the legality of the sentences imposed under the Federal Escape Act but denied the writ there sought because petitioner established, by his petition, that he was legally confined under the three-year sentence imposed for violation of the Dyer Act, the Court holding that under such circumstances petitioner could not, in that action, contest the validity of the sentences imposed under the Federal Escape Act. In Eyler v. Aderhold, 73 F. (2d) 372, petitioner, while under a sentence of two years and six months, escaped from the Federal Prison Farm at Camp Lee, Virginia. For such escape he was sentenced to one year and one day under the Federal Escape Act. The judgment recited that the sentence imposed be in addition to any sentence then being served and imposed against the petitioner therein in another jurisdiction. After serving his two-year and six-month sentence he sought release, by habeas corpus, claiming that the sentence under the Federal Escape Act should have been made to run concurrently with the sentence previously imposed upon him, the defendant basing such contention on Sec. 709a, 18 U. S. C. A. The Court
denied the contention there made by petitioner and held
39 that to give effect to petitioner's contention would be to hold that Congress had repealed Sec. 753a, 18 U. S. C. A., insofar as said last-named section provides that a sentence thereunder shall begin to run after the expiration of the sentence being served when the escape occurred.

Research has failed to disclose a case in which the identical question here presented has been decided. However, in Thomas v. Hunter, supra, the Court, considering the last sentence of Sec. 753h, supra, in connection with Sec. 709a of T. 18, U. S. C. A., and in the light of the contention made by petitioner in that case, said:

"The words of the statute are:

"'The sentence imposed hereunder shall begin on expiration of, *or upon legal release* from, any sentence *under which such person is held at the time of such escape* * * *.' If petitioner's construction of the statutory proviso were correct, then the phrases 'or upon legal release' and 'under which such person is held at the time of such escape' would be meaningless and would be more surplusage."

In the case at Bar defendant was in the custody of the United States Marshals from whom he attempted to escape while said Marshals were in possession of process (three judgments and commitments) calling for defendant's confinement in the custody of

the Attorney General of the United States for a total of five years. Defendant had begun service of said sentences while in jail at El Dorado, Arkansas, awaiting transportation to the place at which his sentence was to be served. Under the sentences then imposed against defendant he could not have been legally released
40 from such confinement until October 25, 1950, unless his sentence was reduced in accordance with the provisions of T. 18, U. S. C. A, Sec. 710. The last-referred-to section allows deductions for good conduct from sentences of persons convicted of offenses against the laws of the United States, and sets forth the manner in which such good conduct deductions should be computed. The last sentence of said Sec. 710, supra, provides:

"When a prisoner has two or more sentences, the aggregate of his several sentences shall be the basis upon which his deduction shall be estimated."

Although each sentence imposed on the defendant by the United States District Court for Arkansas was a separate and distinct entity, yet, with the good time allowance granted to defendant, as a matter of grace by Sec. 710, supra, he could not have been "legally released" from the aggregate amount of such sentences until he had "served such number of days, with good behavior, as, when added to the deductions allowed at the rate of eight days for each month, shall equal the total of the combined sentences assessed against him." Ebeling v. Biddle, 291 F. 567. The mandate of Sec. 753h, supra, is that the sentence to be imposed upon an escapee, or one who attempts to escape, who is under sentence at the time of escape, or attempted escape, shall not begin to run until the expiration of any previous sentence "or upon legal release from *any* sentence under which such person is held." [Italics supplied.] The word "any" according to Webster's New International Dictionary means: "One indifferently out of a number; one, no matter
41 what one."

Defendant, being held under three separate sentences at the time of his attempted escape and not entitled to his legal release therefrom until he had served the term of such sentences according to law, the Court could, under the Federal Escape Act, provide that the sentence imposed thereunder legally begin to run after the service of any one of such sentences, or the combined term of all such sentences. To hold otherwise would be to make meaningless the phrase "or upon legal release from any sentence under which such person is held." To sustain the contention here made by defendant would produce the absurd result of permitting a person, having accumulative sentences, to avoid the penalty provided for a violation of the Federal Escape Act, if such person escaped during the term of the first or an intermediate sentence.

Congress did not intend, by the enactment of the Federal Escape Act, to produce any such result. Defendant's motion, to correct the sentence and judgment heretofore entered herein on the 17th day of January 1946, is, by the Court, overruled.

(S) ALBERT A. RIDGE, *Judge.*

Dated at Kansas City, Missouri, this 22nd day of August 1946.
Filed in the U. S. District Court on the 23rd day of Aug. 1946.

42 In the District Court of the United States for the Western District of Missouri, Southwestern Division

No. 1933

UNITED STATES OF AMERICA, PLAINTIFF

v.

JIMMY IRA BROWN, DEFENDANT

Order overruling motion for correction of sentence

Aug. 22, 1946

Now on this day defendant's motion for correction of sentence is, by the Court, overruled.

(S) ALBERT A. RIDGE, *Judge.*

Dated at Kansas City, Missouri, this 22nd day of August 1946.
Filed in the U. S. District Court on the 23rd day of August 1946.

43 In the District Court of the United States for the Western District of Missouri, Southwestern Division

[Title omitted.]

Notice of appeal

Filed Sept. 2, 1946

Name and address of Appellant—Jimmie Ira Brown, Leavenworth, Kansas.

Name and address of Appellant's attorney—Justin Ruark, Neosho, Missouri, at the time of arraignment, plea, and judgment; none on this appeal.

Offense—Attempt to escape from a United States Marshal while being transported from Eldorado, Arkansas, to the United States Penitentiary at Leavenworth, Kansas.

Judgment—January 17, 1946. Custody of Attorney General for a period of five (5) years to begin at expiration of any sentence is now being served or which is to be served and which was imposed prior to the date of the sentence herein.

I am now confined in the United States Penitentiary at Leavenworth, Kansas.

I, Jimmie Ira Brown, hereby appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the Order entered August 23, 1946, denying my Motion to correct the Sentence and Judgment herein.

Dated September 2, 1946.

JIMMIE IRA BROWN,
By H. C. SPAULDING,
Deputy Clerk, U. S. Dist. Court.

(This Notice of Appeals prepared by the Clerk of the above Court at the request of defendant as provided by Rule 37 of the Rules of Criminal Procedure.)

Received copy of the above-entitled Notice of Appeal on this 2nd day of September 1946.

Sam M. Wear,
SAM M. WEAR,
United States Attorney.
By ———,
Assistant U. S. Attorney.

Filed in the U. S. District Court on September 2, 1946.

44 In the District Court of the United States for the Western District of Missouri, Southwestern Division

[Title omitted.]

Order granting leave to proceed in forma pauperis

Sept. 2, 1946

Upon application of the defendant, it is ordered that he be granted leave to appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the order entered herein on August 23, 1946, denying his Motion to correct the judgment and sentence, and it is

Further ordered that he be permitted to prosecute his appeal in forma pauperis.

Dated this 2nd day of September 1946.

ALBERT A. RIDGE, *District Judge.*

Filed in the U. S. District Court on the 2nd day of September 1946.

45 In United States District Court

Request for Appeal and Transcript

From Jimmie Ira Brown, Leavenworth, Kansas, Sept. 11, 1946,
Post Office Bldg., Kansas City, Missouri.
To Mr. A. L. Arnold, Clerk.

Special purpose. Sept. 14, 1946. Censored 1.

DEAR SIR: In reply to your letter of Sept. 7th, 1946, in which you state that you do not have the authority to comply with Rule 37 of the New Rules of the Supreme Court in Criminal Cases. I wish to call your attention to the Fact that we have no more Roy Bean Courts, and; We have Rules handed down by the United States Supreme Court and we, you, and I are agoing to abide by them.

For your information I have filed No Petition to Appeal in Forma Pauperis from the "Memorandum Opinion" which was heard and overruled August 22, 1946. And in Case you are interested in Rule 37 of the Supreme Court, it provides as follows: "When a Court after trial imposes sentence upon a defendant not represented by Counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant."

It is for the second time hereby requested by the defendant in Criminal Case No. 1933 that you the Clerk of the District Court of the United States for the Western District of Missouri, prepare and file forthwith a notice of appeal from the Districts Court's "Memorandum Opinion" in case No. 1933 Criminal, dated at Kansas City, Missouri, August 22, 1946. It is also hereby requested that you file this as a petition to obtain the following Court records without paying or securing Coust thereof, under the terms of Section 832, title 28 United States Code.

1. Notice of Appeal.
2. Copy of the Memorandum Opinion dated Aug. 22, 1946, in Criminal case No. 1933.
3. Copys of the Arkansas Court records, termed as Exhibit A and B.
4. Affidavit in forma pauperis.
5. Copys of Motion to correct sentence in Case No. 1933 Criminal.
6. Certified Copy of transcript.

All the above entitled records are hereby requested to be
46 sent to the Eighth Circuit Court of Appeals, in St. Louis, Missouri.

PRAYER

Wherefore, good and sufficient Cause having been shown in law and in facts, defendant moves this Honorable Court to grant the

above-entitled request, and Comply with Rule 37 of the Supreme Court in Criminal Cases.

Respectfully Submitted,

JIMMIE IRA BROWN,
Petitioner.

Reg. No. 62288.

47 [Clerk's certificate to foregoing transcript omitted in printing.]

48 United States Circuit Court of Appeals, Eighth Circuit

No. 13445

JIMMIE IRA BROWN, APPELLANT

vs.

UNITED STATES OF AMERICA

Appearances

The Clerk will enter my appearance as Counsel for the Appellant.

ELMO B. HUNTER.

Filed in U. S. Circuit Court of Appeals, Jan. 10, 1947.

Appearance of Mr. Sam M. Wear, as Counsel for Appellee.

The Clerk will enter my appearance as Counsel for the Appellee.

SAM M. WEAR.

Filed in U. S. Circuit Court of Appeals, Oct. 11, 1946.

49 In United States Circuit Court of Appeals

Order of January 7, 1947, appointing counsel to represent appellant and continuing cause to March Term, 1947

Upon examination this day of the brief of appellant there comes to the attention of the Court for the first time the motion attached thereto for appointment of counsel. After consideration of said motion it is Ordered by the Court that Mr. Elmo B. Hunter, of Kansas City, Missouri, be, and he is hereby, appointed as counsel for appellant in this Court to represent said appellant on his appeal and to prepare and file such additional or supplemental brief, if any, as to him may seem advisable. Such additional or supplemental brief, if any, may be in typewritten form, and five clear

legible copies should be filed and a copy served on counsel for appellee on or before February 10, 1947.

To enable counsel to prepare this cause for presentation, it is by the Court hereby continued to the March Term, 1947, of this Court at Kansas City, Missouri.

JANUARY 7, 1947.

50 In United States Circuit Court of Appeals

Order of submission

March 3, 1947.

This cause having been called for hearing in its regular order and counsel not appearing for either party to make oral argument, the same is thereupon taken by the Court as submitted on the transcript of the record from said District Court and the briefs filed herein.

51 United States Circuit Court of Appeals, Eighth Circuit

No. 13445

JIMMIE IRA BROWN, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the District Court of the United States for the Western District of Missouri

Opinion

April 4, 1947

Mr. Elmo B. Hunter on brief for Appellant.

Mr. Sam M. Wear, United States Attorney, and Mr. Earl A. Grimes, Assistant United States Attorney, on brief for Appellee.

Before GARDNER, THOMAS, and RIDDICK, Circuit Judges.

GARDNER, Circuit Judge, delivered the opinion of the Court.

This is an appeal from an order denying appellant's motion to vacate or correct a sentence entered against him on his plea of guilty to a charge of violating the Federal Escape Act (18 U. S. C. A. Sec. 753h).

52 At the time of the entry of the challenged sentence three sentences had already been imposed against appellant by the United States District Court for the Western District of Arkansas. These sentences were all entered on October 26, 1945, the first being for a term of one year, the second for a term of two years and the third for a term of two years, the sentences to run consecutively. Following the imposition of these sentences appellant was confined to the Federal prison at Leavenworth, Kansas. On November 8, 1945, while appellant was being transported to the Federal prison at Leavenworth, Kansas, for confinement, he attempted to escape from the custody of the United States Marshal and his deputy. This attempt to escape was committed in the State of Missouri and an indictment was duly returned against him charging a violation of Section 753h, Title 18 U. S. C. A. On a plea of guilty to the charge he was sentenced to the custody of the Attorney General of the United States for confinement for a period of five years, the term of the sentence "to begin at the expiration of any sentence he is now serving or to be served which was imposed prior to this date * * *."

On his motion to vacate or amend this sentence appellant contended and renews the contention here that the sentence imposed on him by the United States District Court for the Western District of Missouri should have been made to commence at the termination of the one year sentence, that being the first in order of time of the three consecutive sentences imposed upon him by the United States District Court for the Western District of Arkansas. The first sentence by its terms provided that it should be for a term of "one year *from this date.*" [Italics supplied.] Section 709a, Title 18 U. S. C. A., provides, among other things, that,

"The sentence of imprisonment of any person convicted of
53 a crime in a court of the United States shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of said sentence: Provided, That if any such person shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, the sentence of such person shall commence to run from the date on which he is received at such jail or other place of detention. No sentence shall prescribe any other method of computing the term."

As has been noted, appellant was, immediately following the imposition of his sentence, committed to the jail at El Dorado, Arkansas, to await transportation to the Federal prison at Leavenworth, Kansas, so that it conclusively appears that from the date of the imposition of the first sentence he was serving that sentence, and hence, he was serving that sentence at the time he attempted to

escape on November 8, 1945. Galatas v. United States, 8 Cir., 80 F. 2d 15. The trial court expressed the view that,

"Defendant being held under three separate sentences at the time of his attempted escape and not entitled to his legal release therefrom until he had served the term of such sentences according to law, the Court could, under the Federal Escape Act, provide that the sentence imposed thereunder legally begin to run after the service of any one of such sentences, or the combined term of all such sentences." U. S. v. Brown, 67 F. Supp. 116.

The sentence as actually imposed was to begin after the service of the combined term of all three prior sentences. The Federal Escape Act (18 U. S. C. A. Sec. 753h) provides that the sentence imposed upon one guilty of an offense thereunder "shall be in addition to and independent of any sentence imposed in the case in connection with which such person is held in custody at the time of such escape or attempt to escape." It further provides that,

"If such person be under sentence at the time of such of-
51 fense, the sentence imposed hereunder shall begin upon the expiration of, or upon legal release from, any sentence under which such person is held at the time of such escape or attempt to escape."

In the final analysis it would seem that the question determinative of the issue involved is whether at the time appellant attempted to escape he was, as the trial court said, "being held under three sentences." Manifestly, if he were so held then the court was warranted in imposing a sentence "to begin at the expiration of any sentence he is now serving *or to be served*, which was imposed prior to this date." [Italics supplied.] By the specific mandate of his first sentence it was to begin on the date it was imposed. He was at once committed to a jail to await transportation to the place at which his sentence was to be served so that there can be no doubt that he at once began actually serving the first sentence imposed upon him. He could not have been serving nor was he being held under the other sentences because neither of them was to begin until a later date and they constituted no warrant for holding appellant. Each sentence was a separate one and they can not be so commingled as to be converted into one continuous sentence.

The Federal Escape Act provides one rule where a person escapes from legal custody before conviction and another where a person is serving a sentence at the time of attempting to escape. In the former case the sentence may be concurrent with any sentence imposed for any other crime but in the latter case the sentence must be consecutive to the sentence which he is serving and in addition thereto. Rutledge v. United States, 5 Cir., 146 F. 2d 199. Under

the literal words of the statute the sentence provided as punishment for one who is serving a sentence must begin at the expiration of or release from "any sentence under which such person is held at the time of such escape or attempt to escape." The statute
55 is a penal one and should be strictly construed in favor of the accused. Rutledge v. United States, supra; Viereck v. United States, 318 U. S. 236. In the last cited case Chief Justice Stone, speaking for the Supreme Court, said:

"We cannot read that phrase as though it had been written 'while an agent' or 'who is an agent.' The unambiguous words of a statute which imposes criminal penalties are not to be altered by judicial construction so as to punish one not otherwise within its reach, however deserving of punishment his conduct may seem."

It can not, we think, be said that appellant was being held upon sentences which by their very terms were not to begin until some time in the future. On the other hand, he was being held under a sentence to expire one year from the date of its entry.

Both parties cite and rely somewhat upon the case of Thomas v. Hunter, 10 Cir., 153 F. 2d 834. The facts in that case were that while the accused was out on parole he was indicted and pleaded guilty to a violation of the Dyer Act and was sentenced to four years imprisonment. Thereafter he attempted to escape and on trial was found guilty on two counts and was sentenced to five years imprisonment on each of the two charges, the sentences to run consecutively as was also the sentence under the Dyer Act, making a total of fourteen years imprisonment. The term of sentence for violation of the Federal Escape Act was to begin at the expiration of the sentence imposed under the Dyer Act. It seems that at the time he violated the Dyer Act he was out on parole from a sentence previously imposed and he contended that the sentences under the Federal Escape Act were void because they were not made to begin at the expiration of the term previously entered and from which he was out on parole.

The court held that Thomas was not being held under the
56 sentence from which he was out on parole at the time he violated the Federal Escape Act. It seems clear, however, that if he had been held under a sentence at the time of his attempted escape, under the court's reasoning the sentence should have commenced at the expiration of such prior sentence. In the course of the opinion it is said:

"Petitioner not having been under the original sentence at the time he broke jail, it follows that when the court passed the sentences for the jail break, the provision of the statute which he seeks to invoke did not apply to him.

"Furthermore, we think the proviso upon which petitioner relies means that where one is confined and actually serving a prior sentence when he escapes from custody, then the sentence for such escape must be fixed with relation to the expiration date of the prior sentence or with reference to the date on which one is thereafter legally released from confinement thereunder."

We are of the view that in the instant case appellant was actually serving a prior sentence when he attempted to escape and hence, under the reasoning of the Thomas case, "the sentence for such escape must be fixed with relation to the expiration date of the prior sentence." It is to be observed that in the Thomas case the court held that the provision of the Federal Escape Act here invoked does not apply unless at the time the person attempts to escape he is actually being held in custody under sentence. In the Thomas case the accused was out on parole at the time he attempted to escape and even though the sentence which had been imposed on him had not been completed and his parole might have been revoked so that at some future date he might have to complete serving that sentence, yet the court held that the sentence under the Escape Act was not to be imposed with relation to the prior sentence under which the accused was not in fact being held at the time of his attempted escape. So in the instant case
57 it can not be said that the appellant was being held on the sentences that had been imposed but which would not become effective until a future date. We can not amend the Federal Escape Act, however desirable that may be, so as to read, "The sentence imposed hereunder shall begin upon the expiration of the aggregate of all sentences previously imposed against defendant." The statute seems to be unambiguous so as to express the intention of Congress, and it is noted that in the Federal statute governing good conduct commutations, Congress used the words "aggregate of his several sentences," and the absence of such words from the Escape Act would seem to be significant. It is argued that the words providing that the sentence imposed for escape "shall begin upon the expiration of, or upon legal release from, any sentence under which such person is held at the time of such escape or attempt to escape," should be construed to include any and all sentences which have been imposed. Under the authorities it is clear that the mere fact that a sentence has been imposed does not necessarily mean that the person is held under such sentence. It may, as in the instant case, by its terms be postponed to commence at a future date. The words "any sentence," as they appear in this statute, are clearly restricted by the words immediately following: "under which such person is held." It is, of course, entirely possible that one might be held under two sentences at the same time if they are imposed to run

concurrently. One of these imposed sentences might be a one year sentence and the other a two year sentence. In such event the sentence under the Escape Act might be fixed to begin at the expiration of either of these sentences being at the time concurrently served.

Being of the view that appellant at the time of his attempted escape was being held under only one sentence, the sentence
58 to be imposed must begin at the expiration of the sentence so being served. The order appealed from is therefore reversed and the cause remanded to the trial court with directions to correct the sentence imposed for violation of the Federal Escape Act so that it shall begin upon the expiration of or upon legal release from the sentence under which appellant was serving at the time of his attempted escape, to wit: the one year sentence imposed by the United States District Court for the Western District of Arkansas.

59 United States Circuit Court of Appeals, Eighth Circuit

JIMMIE IRA BROWN, APPELLANT

vs.

UNITED STATES OF AMERICA

Judgment

April 4, 1947

Appeal from the District Court of the United States for the Western District of Missouri

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Missouri, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be, and the same is hereby, reversed without costs to either party in this Court.

And it is further Ordered by this Court that this cause be, and the same is hereby, remanded to the said District Court with directions to correct the sentence imposed for violation of the Federal Escape Act so that it shall begin upon the expiration of or upon legal release from the sentence under which appellant was serving at the time of his attempted escape, to-wit: the one year sentence imposed by the United States District Court for the Western District of Arkansas.

APRIL 4, 1947.

60 In the United States Circuit Court of Appeals, Eighth Circuit

[Title omitted.]

Petition for rehearing

Filed April 15, 1947

Comes now the United States of America, the appellee herein, by its attorneys of record, Sam M. Wear, United States Attorney, and Earl A. Grimes, Assistant United States Attorney, and petition the Court for a rehearing of the above-entitled cause, for reasons, as follows:

1. The judgment is for the wrong party.

2. The judgment is unwarranted, the facts and the law with relation thereto considered.

3. The judgment and the opinion of the Court declaring the law in support thereof would, if permitted to stand, effectually operate to destroy the virility of the Statute, to wit; Section 753h, Title 18, U. S. C., under which the appellant was convicted.

61 4. The judgment is contrary to the provisions of the Statute.

5. The Court erred in its interpretation of the law as written in its opinion and mandate directing the trial court to correct the judgment and sentence.

6. The Court has misconstrued the meaning of the terms used by Congress in enactment of the Escape Act. The Act provides:

"If such person be under sentence at the time of such offense, the sentence imposed hereunder shall begin upon the expiration of, or upon legal release from, any sentence under which such person is held at the time of such escape or attempt to escape."

Such Act deals with kinds of sentences and not service of sentences.

In construing such provision of said Act, the Court has interpreted the word "any" to mean one singly. It has also interpreted "held" mean "served or serving." The Court by its interpretation of said Act has modified and changed the substantive Criminal Law relating to sentences and commitments. The literal meaning of the terms used in the Act permit of no such construction. The word "any," according to Webster's New International Dictionary, means: "One indifferently out of a number, no matter what one." At the time appellant in the case at Bar attempted to escape, he had been committed to the custody of the Attorney General of the United States under three cumulative sentences. At the time of his attempted escape, he was being "held" in custody of the Marshals who were transporting him to Leavenworth Penitentiary as representatives of the Attor-

ney General under the judgments and commitments assessing cumulative sentences. That he had begun to "serve" one of such sentences under one commitment is immaterial.

62 The Statute in question says nothing about a defendant serving a sentence. What the statute is concerned with is how the person escaping or attempting to escape is being held. The fact that the judgments and commitments under which appellant was being held at the time of his escape called for cumulative service of time does not militate against the fact that he was being "*held*" under the authority of each such judgment and commitment. He could not legally be released from the custody in which he was then held without satisfying service of time called for by such cumulative sentences. Which of such cumulative sentences he had begun to serve is not decisive for the mandate of the Statute is that he is subject to the penalties for escape or attempt to escape if he is held under "any sentence," and, literally interpreted, that means, no matter what one; one or the other.

"Held" is the present participle of "hold." The tense in which it is used in the Act in question expresses a mode or mood; and not quantity, length, or time. Such tense refers to the state in which a defendant is placed, and not to the length or time of the happening of such state. Hence, the word "held" as used in the Act cannot be said to refer to time nor be used as a synonym for serve, served, or serving, as the Court attempts to construe such word in its interpretation of the Act in question.

On page 3 of its opinion, the Court states:

"So that it conclusively appears that from the date of the imposition of the first sentence he was serving that sentence and hence, he was serving that sentence at the time he attempted to escape."

On page 4, the Court says:

"In the final analysis, it would seem that the question

63 determinative of the issue involved is whether at the time appellant attempted to escape he was, as the trial court said, 'being held under three sentences.'"

Thereupon, the Court proceeds to determine that because appellant had begun to serve the first sentence imposed upon him, that he was only "held" under that one sentence. Had Congress intended such a result, it would have used the verb "serving" in said Act instead of the verbal "held." On page 5 of its opinion, the Court says:

"The Federal Escape Act provides one rule where a person escapes from legal custody before conviction and another where a person is serving a sentence at the time of attempting to escape."

Such interpretation makes the word "serving" a synonym for "held." Serve, served, or serving are verbs indicative of action,

length, or time. A present participle used as a verbal never denotes length or time, but only a mode or mood. "Held" is such a present participle of hold.

To give interpretation to the Escape Act that the Court gives to it in its opinion nullifies such Act as a means for punishment of those who escape or attempt to escape from the legal custody of the Attorney General of the United States. When Congress passed such Act, it intended that a person who escaped or attempted to escape from the legal custody of the Attorney General of the United States, after having been sentenced by a court of competent jurisdiction for an offense or offenses, should be punished with additional punishment for such offense. Assume that appellant in the case at Bar had been given three five-year cumulative sentences. Under the Court's interpretation of the Act, appellant could have escaped during the service of his first sentence and the only punishment he would receive therefor would be
64 to serve five years' imprisonment concurrently with the second five-year cumulative sentence. Likewise, appellant could escape during service of his second cumulative sentence and the only punishment that could be meted out to him would be punishment to be served concurrently with his third five-year sentence so previously assessed. For each such escape appellant would receive no punishment, even though in attempting such escape he jeopardized the lives of the Marshals who "held" him in custody, as appellant did in the case at Bar. No such result was intended by Congress, because it used the word "held" in said Act, and not the word "serving," and it used the word "held" in such a tense as to make it apply to "any sentence" of a defendant.

Furthermore, the interpretation that this Court gives to the Escape Act reads into such Act a limitation not included by Congress. Such limitation nullifies and changes the whole philosophy and theory relative to sentences known to criminal jurisprudence and the power of courts to assess cumulative sentences. The great weight of authority and the universal rule insofar as Federal Criminal Jurisprudence is concerned is in favor of the proposition that a court has power derived from the common law to impose cumulative sentences on conviction on several offenses charged in separate indictments or in several counts of the same indictment, the imprisonment under one to commence at the termination of that of the other. 15 Am. Juris., page 121. The Escape Act as enacted by Congress was not intended to modify or change such rule of criminal procedure. The purpose Congress had in mind at the time of the enactment of the Escape Act, as manifest from the terms of the Act itself, was, that if one committed to legal custody for the commission of a criminal offense escaped or attempted to escape, he should be guilty of an offense and

65 the court in which such offense was tried, if such person was found guilty, could not assess a sentence so as to make the same run concurrent with the sentence that such escapee was then serving. In other words, the Escape Act only prevents a sentencing court from assessing a sentence which could be made to run concurrent with "any sentence" the escapee was being held at the time of escape, and did not change the law, anciently existing relating to cumulative sentence. There is no restriction in the Escape Act limiting the power of a sentencing court to sentence a defendant guilty of the violation of said Act to a term to begin after the service of the sentence he is then serving. The limitation is that a sentence assessed under such Act shall not begin to run until "expiration, or legal release from, any sentence under which such person is held at the time of such escape."

Wherefore, your movant prays the Court to grant a rehearing of the entitled cause.

SAM M. WEAR,
United States Attorney for the Western District of Missouri,
EARL A. GRIMES,
Assistant United States Attorney,
Attorneys for Appellee.

The undersigned, one of the attorneys of record for the appellee herein, does hereby certify that the within petition for rehearing is filed in good faith and with absolute confidence that it is meritorious, and that the petition should be granted.

SAM M. WEAR,
United States Attorney for the Western District of Missouri,
By EARL A. GRIMES,
Assistant United States Attorney.

[File endorsement omitted.]

66 IN UNITED STATES CIRCUIT COURT OF APPEALS

Order denying petition of Appellee for rehearing

April 25, 1947

Petition for rehearing filed by the appellee in this cause having been considered by this Court, It is now here Ordered that the same be, and it is hereby, denied.

APRIL 25, 1947.

67 [Clerk's certificate to foregoing transcript omitted in printing.]

U. S. GOVERNMENT PRINTING OFFICE: 1947

Supreme Court of the United States

Order granting motion for leave to proceed in forma pauperis

October 13, 1947

On consideration of the motion of the respondent for leave to proceed herein in forma pauperis,

It is ordered by this Court that the said motion be, and the same is hereby, granted.

765697—47

Supreme Court of the United States

Order allowing certiorari

Filed October 13, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1947

FILE COPY

No. 1405 100

In the Supreme Court of the United States

OCTOBER TERM, 1946

UNITED STATES OF AMERICA, PETITIONER

v.

JIMMIE IRA BROWN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1405

UNITED STATES OF AMERICA, PETITIONER

v.

JIMMIE IRA BROWN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Acting Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Eighth Circuit entered April 4, 1947,[1] reversing an order of the district court, which overruled respondent's motion to correct a sentence for escape—in order to have it commence to run at the expiration of the first of several consecutive sentences previously imposed against respondent, rather than at the expiration of the combined term of such sentences.

[1] Rehearing denied April 25, 1947.

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 31–36) has been reported at 160 F. 2d 310. The opinion of the district court (R. 22–27) is reported at 67 F. Supp. 116.

JURISDICTION

The judgment of the circuit court of appeals was entered April 4, 1947 (R. 36), and a petition for rehearing was denied April 25, 1947 (R. 40). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure.

QUESTION PRESENTED

Whether the provision of the escape statute, requiring that a sentence for escape shall begin to run upon the expiration of any sentence under which the prisoner is held at the time of escape, requires that a sentence for escape imposed upon a prisoner who is in custody under several consecutive sentences shall begin at the expiration of the particular sentence being served at the time of the escape rather than at the expiration of the combined term of the prior consecutive sentences.

STATUTE INVOLVED

The Act of May 14, 1930, c. 274, § 9, 46 Stat. 327, as amended by the Act of August 3, 1935, c. 432, 49 Stat. 513 (18 U. S. C. 753h), provides:

Any person committed to the custody of the Attorney General or his authorized representative, or who is confined in any penal or correctional institution pursuant to the direction of the Attorney General, or who is in custody by virtue of any process issued under the laws of the United States by any court, judge, or commissioner, or who is in custody of an officer of the United States pursuant to lawful arrest, who escapes or attempts to escape from such custody or institution, shall be guilty of an offense. If the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense whatsoever, the offense of escaping or attempting to escape therefrom shall constitute a felony and any person convicted thereof shall be punished by imprisonment for not more than five years or by a fine of not more than $5,000, or both; and if the custody or confinement is by virtue of an arrest or charge of or for a misdemeanor, and prior to conviction, the offense of escaping or attempting to escape therefrom shall constitute a misdemeanor and any person convicted thereof shall be punished by imprisonment for not more than one year or by a fine of not more than $1,000, or both. The sentence imposed hereunder shall be in addition to and independent of any sentence imposed in the case in connection with which such person is held in custody at the time of such escape or attempt to escape. If such person be under sentence at the time of such

offense, the sentence imposed hereunder shall begin upon the expiration of, or upon legal release from, any sentence under which such person is held at the time of such escape or attempt to escape.

STATEMENT

On October 26, 1945, respondent was sentenced under two indictments in the United States District Court for the Western District of Arkansas. The first indictment was in two counts and charged conspiracy to escape and attempted escape; the other charged a violation of the National Motor Vehicle Theft Act. Respondent was sentenced under the first indictment to imprisonment for one year on the second count and two years on the first count, to run consecutively in that order; and on the other indictment, he was sentenced to imprisonment for two years to begin upon the expiration of the sentences imposed under the first indictment. He was thus sentenced to imprisonment for a total of five years under both indictments. (R. 13–21.)

On November 2, 1945, while respondent was in the custody of two United States marshals who were transporting him through the State of Missouri to Leavenworth Penitentiary, he attempted to escape. He was indicted for this attempted escape in the District Court for the Western District of Missouri, and he pleaded guilty (R. 1, 3).

On January 17, 1946, he was sentenced as follows (R. 3):

> It is by the court ordered and adjudged that the defendant, having been found guilty of said offense, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of five (5) years to begin at the expiration of any sentence he is now serving, or to be served which was imposed prior to this date, without costs.

In July 1946, respondent filed a motion in the District Court for the Western District of Missouri to correct this last sentence imposed by that court, contending that, at the time of the attempted escape, he was being held only under the one-year sentence imposed on the second count of the first indictment returned against him in the Western District of Arkansas, and that his sentence for the attempt to escape in Missouri was required to commence at the expiration of such one-year sentence (R. 10–13). He based his contention on that part of 18 U. S. C. 753h which reads as follows:

> If such person be under sentence at the time of such offense, the sentence imposed hereunder shall begin upon the expiration of, or upon legal release from, any sentence under which such person is held at the time of such escape or attempt to escape.

The district court overruled the motion (R. 27). On appeal, the circuit court of appeals reversed the order of the district court and sustained respondent's contention (R. 36). The opinion of the circuit court of appeals recognizes that, in sentencing respondent for the attempted escape, the Missouri court intended to have the sentence begin at the expiration of the combined term of all three prior sentences, but holds that the court was without power to fix that condition on the ground that, under the language of 18 U. S. C. 753h, a sentence for an escape or attempted escape must begin at the expiration of the particular sentence which the prisoner is serving at the time of the escape or attempt (R. 31–36).

SPECIFICATION OF ERRORS TO BE URGED

The circuit court of appeals erred:

1. In holding that, under 18 U. S. C. 753h, a sentence for escape, imposed against a person in custody under several consecutive sentences, must begin at the expiration of the particular sentence which he is serving at the time of the escape, rather than at the expiration of the combined term of the consecutive sentences.

2. In holding that a prisoner against whom several consecutive sentences have been imposed is "held," within the meaning of 18 U. S. C. 753h, only under the particular sentence which he is serving at the time of escape, and not under the aggregate sentences.

3. In reversing the order of the district court denying petitioner's motion to correct his sentence for attempted escape in order to have it commence to run at the expiration of the particular sentence he was serving at the time of the attempted escape, rather than at the expiration of the combined term of the consecutive sentences.

REASONS FOR GRANTING THE WRIT

1. The decision below achieves a result which is clearly contrary to the purpose of Congress in providing for separate punishment for escape or attempted escape. It is evident from the language quoted, *supra*, pp. 3–4, that in providing that a sentence for escape shall begin upon the expiration of or legal release from any sentence under which the prisoner is held at the time of escape, Congress intended to make certain that there would be an additional punishment for the escape, as distinguished from the offense for which the prisoner is incarcerated. Under the decision below, that intention would be frustrated in every situation where an escape is effected or attempted during the service of any but the last of consecutive sentences. The holding below achieves the anomalous result that a sentencing court may direct that a sentence or any other offense shall begin at the expiration of the aggregate term of consecutive sentences theretofore imposed, but may not do so for the offense of escape, which

Congress clearly intended to be subject to separate punishment.

2. The decision below is predicated on the assumption that the literal language of the statute compels the conclusion reached, although the result may be undesirable. We submit, however, that the language of the statute does not necessarily compel such a result. The statute provides that the sentence for escape shall begin upon expiration or legal release from "any sentence under which such prisoner is held at the time of such escape." The court below reads "held" as equivalent to "being served" at the time of the escape. We submit, however, that the two terms are not synonymous. A person in custody under several consecutive sentences is, in a very practical sense, being "held" under the combined sentences. His good time allowance is computed on the basis of the combined sentences rather than on the basis of the separate individual sentences (18 U. S. C. 710), and if he forfeits his good time allowance after the expiration of one of the several sentences, he loses the good time earned earlier on that sentence. *Aderhold* v. *Perry*, 59 F. 2d 379 (C. C. A. 5); *Tippitt* v. *Squier*, 145 F. 2d 211 (C. C. A. 9). His eligibility for parole under 18 U. S. C. 714 is also computed on the basis of the combined sentences. Hence, when the clause "any sentence under which such person is held," as used in 18 U. S. C. 753h, is read in the light of

its purpose and in the light of the practical effect of consecutive sentences on the rights of the prisoner, we think it must mean the aggregate of consecutive sentences under which the prisoner is confined at the time of escape, rather than the particular sentence which is being served at the time.

3. It is evident that the question is one of importance. The decision below casts doubt upon the validity of every existing sentence for escape or attempted escape imposed on prisoners in custody under several consecutive sentences. Moreover, the construction adopted by the court below affects future sentences for escape, and it is important that the meaning of the statute be definitely settled.

CONCLUSION

Since the construction of the escape statute adopted by the court below is contrary to the obvious intent of Congress in providing for separate punishment for escape, and since, in our opinion, such construction is not compelled by the literal language of the statute, we respectfully submit that this petition for a writ of certiorari should be granted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

MAY 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947

No. 100

In the Supreme Court of the United States

OCTOBER TERM, 1947

UNITED STATES OF AMERICA, PETITIONER

v.

JIMMIE IRA BROWN

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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OCTOBER TERM, 1947

No. 100

UNITED STATES OF AMERICA, PETITIONER

v.

JIMMIE IRA BROWN

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 22–27) is reported at 67 F. Supp. 116. The opinion of the Circuit Court of Appeals (R. 31–36) is reported at 160 F. 2d 310.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 4, 1947 (R. 36), and a petition for rehearing (R. 37–40) was denied April 25, 1947 (R. 40). The petition for a writ of certiorari was filed May 23, 1947, and was granted October 13, 1947 (R. 42). The jurisdiction of

this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.

QUESTION PRESENTED

Whether the provision of the federal escape statute that a sentence for escape shall begin upon the expiration of any sentence under which the prisoner is held at the time of escape, requires that a sentence for escape, imposed upon a prisoner who was already in custody under several consecutive sentences, shall begin upon the expiration of the particular sentence being served at the time of the escape or at the expiration of the combined term of the prior consecutive sentences.

STATUTE INVOLVED

The Act of May 14, 1930, c. 274, § 9, 46 Stat. 327, as amended by the Act of August 3, 1935, c. 432, 49 Stat. 513 (18 U. S. C. 753h), provides:

> Any person committed to the custody of the Attorney General or his authorized representative, or who is confined in any penal or correctional institution pursuant to the direction of the Attorney General, or who is in custody by virtue of any process issued under the laws of the United States by any court, judge, or commissioner, or who is in custody of an officer of the United States pursuant to lawful arrest, who escapes or attempts to escape from such

custody or institution, shall be guilty of an offense. If the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense whatsoever, the offense of escaping or attempting to escape therefrom shall constitute a felony and any person convicted thereof shall be punished by imprisonment for not more than five years or by a fine of not more than $5,000, or both; and if the custody or confinement is by virtue of an arrest or charge of or for a misdemeanor, and prior to conviction, the offense of escaping or attempting to escape therefrom shall constitute a misdemeanor and any person convicted thereof shall be punished by imprisonment for not more than one year or by a fine of not more than $1,000, or both. The sentence imposed hereunder shall be in addition to and independent of any sentence imposed in the case in connection with which such person is held in custody at the time of such escape or attempt to escape. If such person be under sentence at the time of such offense, the sentence imposed hereunder shall begin upon the expiration of, or upon legal release from, any sentence under which such person is held at the time of such escape or attempt to escape.

STATEMENT

On October 26, 1945, respondent was sentenced under two indictments in the United States District Court for the Western District of Arkansas

(R. 13–21). The first indictment was in two counts and charged conspiracy to escape and attempted escape (R. 13–15); the other charged a violation of the National Motor Vehicle Theft Act (R. 19). Respondent was sentenced under the first indictment to imprisonment for one year on the second count and two years on the first count, to run consecutively in that order (R. 16); and on the other indictment, he was sentenced to imprisonment for two years to begin upon the expiration of the sentences imposed under the first indictment (R. 20). He was thus sentenced to imprisonment for a total of five years under both indictments.

On November 2, 1945, while respondent was in the custody of a deputy United States marshal and a guard who were transporting him through the State of Missouri to Leavenworth Penitentiary, he attempted to escape. He was indicted for this attempted escape in the District Court for the Western District of Missouri, and he pleaded guilty (R. 1, 3). On January 17, 1946, he was sentenced as follows (R. 3):

> * * * it is by the Court
>
> Ordered and adjudged that the defendant, having been found guilty of said offense, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of five (5) years to begin at the expiration of any sentence he is now serving, or to

> be served which was imposed prior to this date, without costs.

In July 1946, respondent filed a motion in the District Court for the Western District of Missouri to correct this last sentence,[1] contending that at the time of the attempted escape, he was being held only under the one-year sentence imposed on the second count of the first indictment returned against him in the Western District of Arkansas, and that his sentence for the attempt to escape in Missouri was required to commence at the expiration of such one-year sentence (R. 10–13). He based his contention on that part of 18 U. S. C. 753h (often referred to as the Federal Escape Act) which reads as follows:

> If such person be under sentence at the time of such offense, the sentence imposed hereunder shall begin upon the expiration of, or upon legal release from, any sentence under which such person is held at the time of such escape or attempt to escape.

The District Court overruled the motion (R. 27). In its memorandum opinion (R. 22–27), the court held that under the language of the statute the sentencing court *could* provide that respondent's sentence for attempted escape should begin to run after the service of any one of respondent's three

[1] A prior motion to vacate this sentence and the proceedings in relation thereto appear in the record (R. 3–10) but are not involved in this proceeding.

prior sentences or the combined term of such sentences. It also stated (R. 26–27):

> * * * To sustain the contention here made by defendant would produce the absurd result of permitting a person, having accumulative sentences, to avoid the penalty provided for a violation of the Federal Escape Act, if such person escaped during the term of the first or an intermediate sentence. Congress did not intend, by the enactment of the Federal Escape Act, to produce any such result.

On appeal, the Circuit Court of Appeals for the Eighth Circuit sustained respondent's contention and reversed the order of the District Court (R. 36). In its opinion (R. 31–36), the Circuit Court of Appeals assimilated the word "held" in the statute to "serving" and concluded that a sentence for escape or attempted escape must begin at the expiration of the particular sentence which the prisoner was serving at the time of the escape or attempted escape—in this case the one-year sentence on the second count of the first indictment returned against him.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that, under 18 U. S. C. 753h, a sentence for attempted escape, imposed against a person in custody under several consecutive sentences, must begin at the expiration of the particular sentence which he is serving at the time of

the attempted escape, rather than at the expiration of the combined term of the consecutive sentences.

2. In holding that a prisoner against whom several consecutive sentences have been imposed is "held," within the meaning of 18 U. S. C. 753h, only under the particular sentence which he is serving at the time of escape, and not under the aggregate sentences.

3. In reversing the order of the district court denying respondent's motion to correct his sentence for attempted escape in order to have it commence to run at the expiration of the particular sentence he was serving at the time of the attempted escape, rather than at the expiration of the combined term of the consecutive sentences.

SUMMARY OF ARGUMENT

The purpose of the Federal escape statute is to require the imposition of punishment for the crimes of escape and attempted escape which will be in addition to and distinct from the punishment imposed for any other offenses. This is apparent not only from the express language of the statute but from its origin as a penal discipline measure. In the light of the terms and purpose of the statute, it should be construed as requiring that a sentence imposed for attempted escape commence to run only upon the expiration of the aggregate of all consecutive terms of im-

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prisonment to which the offender had been sentenced at the time of the attempted escape. There is no basis for construing the last sentence of the statute so as to require the sentence for attempted escape to commence running at the end of the particular consecutive sentence which the offender was serving at the time of the escape. This would result in the escape sentence running concurrently with the sentences which the offender, at the time of the attempted escape, had yet to commence serving. Such an interpretation would achieve the effect of making the escape statute inapplicable in many cases where the offender is serving heavy consecutive sentences, and of thus removing the deterrent from attempting escape in the situations where it is most needed.

ARGUMENT

I

THE CLEAR PURPOSE OF THE STATUTE IS TO INSURE PUNISHMENT FOR ESCAPE WHICH WILL BE SUPERIMPOSED UPON PUNISHMENT IMPOSED FOR OTHER OFFENSES

The clear purpose of the Federal Escape Act is to make escape or attempted escape from a Federal penal or correctional institution or from the custody of a Federal officer a new and separate crime and to require punishment for such crime which will be separate and distinct from the punishment for the offenses for which the prisoner was originally confined or taken into custody. This purpose of the Congress is clearly

evident from the provisions of the statute prescribing precisely the manner in which punishment for escape or attempted escape shall be imposed, as follows:

> The sentence imposed hereunder shall be in addition to and independent of any sentence imposed in the case in connection with which such person is held in custody at the time of such escape or attempt to escape. If such person be under sentence at the time of such offense, the sentence imposed hereunder shall begin upon the expiration of, or upon legal release from, any sentence under which such person is held at the time of such escape or attempt to escape.

The opinion of the court below recognizes that if the respondent had been serving but a single sentence, the five-year sentence for attempted escape during such confinement must have been imposed to run from the expiration of, or his legal release from, the earlier sentence. In that situation, it is admitted that the escape statute would have been effective to provide additional and distinct punishment for the offense of attempted escape. But where, as here, the offender is serving successive sentences and attempts an escape while he is serving the first of such sentences, the Circuit Court of Appeals held that the sentence for the attempted escape must run from the expiration of such first sentence, even though the length of the combined remaining sentences is

such that as a practical result the prisoner incurs no additional punishment by way of imprisonment for the escape attempt. To the contrary we contend that both the language and history of the escape statute indicate a clear Congressional purpose to insure in all cases the imposition of additional punishment for the crime of escape or attempted escape, and that nothing in the statutory language will support a construction defeating that purpose.

A. THE LEGISLATIVE HISTORY

Escapes and attempted escapes from penal institutions or from official custody present a most serious problem of penal discipline. They are often violent, menacing, as in the instant case, the lives of guards and custodians, and carry in their wake other crimes attendant upon procuring money, weapons and transportation and upon resisting recapture. Prior to the enactment of the original Federal escape statute on May 14, 1930 (c. 274, § 9, 46 Stat. 327), there was no Federal statute prescribing as crimes prison breach or escape by prisoners from custody, although these were crimes under common law (Miller, *Criminal Law*, pp. 463–465). The bill which contained the escape provision was part of a program sponsored by the Attorney General for the reorganization and improved administration of the Federal penal system (H. Rep. 106, 71st Cong., 2d sess; S. Rep. 537, 71st Cong., 2d

sess.). As originally enacted, the escape section (§ 9) dealt only with those who were under sentence at the time of escape or attempted escape. It provided:

> SEC. 9. Any person properly committed to the custody of the Attorney General or his authorized representative or who is confined in any penal or correctional institution, pursuant to the direction of the Attorney General, who escapes or attempts to escape therefrom shall be guilty of an offense and upon apprehension and conviction of any such offense in any United States court shall be punished by imprisonment for not more than five years, such sentence to begin upon the expiration of or upon legal release from the sentence for which said person was originally confined.

It is important to realize that the escape statute originated as and remains a matter of penal discipline and administration, and is therefore *in pari materia* with other Federal statutes dealing with the same problems. Thus viewed, there could be no doubt under the original escape act as to the "expiration" or the duration of "the sentence" for which the prisoner "was originally confined" where he had received consecutive sentences. As of 1930, there had been in effect for years Federal statutes dealing specifically with the expiration or release date in situations where the prisoner was confined under successive sentences. The stat-

ute fixing the deductions from sentences for good conduct, which was enacted on June 21, 1902 (c. 1140, § 1, 32 Stat. 397, 18 U. S. C. 710), specifically provided that "When a prisoner has two or more sentences, the aggregate of his several sentences shall be the basis upon which his deduction shall be estimated." This concept of a single aggregate sentence has been applied to hold that where an offender forfeits his good time allowance after the expiration of one of the constituent sentences, he loses the good time earned earlier on that sentence. *Tippitt* v. *Squier,* 145 F. 2d 211 (C. C. A. 9); *Aderhold* v. *Perry,* 59 F. 2d 379 (C. C. A. 5). Similarly the statute relating to parole, which was enacted on June 25, 1910, and amended on January 23, 1913 (18 U. S. C. 714) specifically provided that a prisoner should not be eligible for parole until he "has served one-third of the total of [the] term *or terms* for which he was sentenced." [Italics ours.]

The escape statute is concerned with the same general problems of prisoner behavior and discipline as the good conduct and parole statutes. And under those statutes, consecutive sentences imposed upon a Federal offender were treated as an aggregate for the purpose of determining when they expired or when the offender was entitled to his release. Thus, it would seem clear that the original Federal escape statute contemplated that a Federal offender confined under several consecutive sentences was to be considered as confined under or

serving, for the purpose of penal discipline and administration, a single sentence composed of the aggregate of the terms of imprisonment prescribed by the consecutive sentences.

The Federal Escape Act as originally enacted, however, covered only those persons who escaped or attempted to escape after conviction and sentence. At the request of the Attorney General (H. Rep. 803, 74th Cong., 1st sess.; S. Rep. 1021, 74th Cong. 1st. sess.) the statute was amended in 1935 to define also as a crime escape or attempted escape while in custody on a Federal charge prior to conviction (*supra*, pp. 2–3). The injection into the statute of this new offense made it necessary, as appears from the draft of the bill submitted by the Attorney General (H. Rep. 803, 74th Cong., 1st sess., p. 2), to insert two new sentences at the end of the legislation so as to specify the method of imposing punishment with respect to each of the two offenses. Where the escape or attempted escape occurred while the offender was held in custody on a Federal charge but prior to conviction and sentence on the charge, the sentence imposed for the escape was to be "*in addition to and independent* of any sentence imposed in the case in connection with which such person is held in custody at the time of such escape or attempt to escape" (italics supplied). The second sentence added by the 1935 amendment is the last sentence of the statute and is the one here involved. It provides that "If such person be under sen-

tence at the time of such offense [of escape or attempted escape], the sentence imposed hereunder shall begin *upon the expiration of, or upon legal release from, any sentence under which such person is held* at the time of such escape or attempt to escape." [Italics supplied.]

It is clear that the purpose of the 1935 amendment was merely to define the new offense of escape from custody prior to sentence, and was in no way intended to change the punishment for escape or attempted escape. Thus, the obvious purpose of the original escape statute to provide punishment by imprisonment in addition to the aggregate of any successive sentences imposed upon the prisoner prior to escape, was not abandoned.

B. THE STATUTORY LANGUAGE

It would be difficult to devise language which would express more clearly than do the last two sentences of the statute, the purpose of Congress to provide punishment for escape and attempted escape which would be superimposed upon any punishment meted out for other offenses. Thus, with respect to escape occurring prior to the imposition of sentence for the original offense, the present statute provides that the sentence imposed for escape or attempted escape *"shall be in addition to and independent of* any sentence imposed in the case in connection with which such person is held in custody at the time of such escape or

attempt to escape." [Italics supplied.] The italicized words clearly connote that the sentence for escape or attempted escape must not be served concurrently with *any* sentence imposed for other offenses.[2]

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[2] In *Rutledge* v. *United States*, 146 F. 2d 199, the Fifth Circuit held that imposition of a sentence for attempted escape from custody prior to sentence, could run concurrently with the sentence imposed in the case as to which the offender was held in custody because such a concurrent sentence would be an "additional and independent sentence" (at p. 200). Not only did that decision completely ignore (it did not discuss) the clear legislative purpose, but it drew a distinction between the last two sentences of the statute, suggesting that under the last sentence the sentence for escape while already serving a sentence must be made consecutive to the sentence which the prisoner was already serving. We have pointed out why there is no basis for such a distinction. Also, in the light of the statutory purpose, it seems overly technical to construe the requirement of a sentence "in addition to and independent of" as satisfied by a concurrent sentence which would be independent of the original sentence only in the sense that it would stand even if the original sentence was later held void.

It should be noted that in the revision of Title 18 of the United States Code embodied in H. R. 3190, 80th Cong., 1st sess. (which was passed by the House on May 12, 1947, but was not acted upon by the Senate), the revised escape provision (Sec. 751) omits the last two sentences of the present statute. In the revisers' notes (H. Rep. 304, 80th Cong., 1st sess., p. A67) it is explained that "Mandatory provision as to separate sentences and order of service was omitted in order to permit court to exercise discretion as to whether sentences should be concurrent or consecutive * * *." This only emphasizes that the last two sentences of the present escape statute are entirely superfluous if that statute is construed as merely empowering the courts to impose at their discretion a concurrent or consecutive sentence for the crime of escape or attempted escape.

The last sentence of the statute now provides that:

> If such person be under sentence at the time of such offense, the sentence imposed hereunder shall begin upon the expiration of, or upon legal release from, any sentence under which such person is held at the time of such escape or attempt to escape.

The statutory command is that a sentence imposed for escape or attempted escape "shall begin upon the expiration of, or upon legal release from, any sentence under which such person is held at the time of such escape or attempt to escape." Here again, the purpose to require punishment for escape or attempted escape which will be entirely distinct from and in addition to the punishment for any other offenses, is clear. The court below recognized this statutory purpose in the situation where at the time of attempted escape the prisoner is serving but a single sentence; there, the court said, the sentence for escape "must be consecutive to the sentence which he is serving and in addition thereto" (R. 33–34). However, the lower court held that where, as in this case, at the time of the attempted escape, the prisoner is confined pursuant to several consecutive sentences, the additional sentence for escape must commence to run at the expiration of the sentence which he was then serving.

Specifically, the lower court, starting with the principle that penal statutes must be strictly construed in favor of the accused, concluded that the words, "any sentence under which such person is held" referred to the particular sentence which the respondent was serving at the time of his attempted escape. In brief, the court found that "held" meant "serving." Thus, since at the time of the attempted escape, the respondent was "serving" his first sentence, i. e., the one-year sentence on the second count of the first indictment, the court held that the sentence for attempted escape should run from the expiration of the one-year sentence, or concurrently with the remaining consecutive two-year sentences.

Conceding that penal statutes should be strictly construed, it is well established that this principle "does not require distortion or nullification of the evident meaning and purpose of the legislation." *United States* v. *Gaskin,* 320 U. S. 527, 529–530; *United States* v. *Raynor,* 302 U. S. 540, 552; *United States* v. *Giles,* 300 U. S. 41, 48; *Gooch* v. *United States,* 297 U. S. 124, 128: *United States* v. *Corbett,* 215 U. S. 233, 242. We have shown that the clear purpose of the escape statute is to provide punishment for the serious crime of escape or attempted escape which will be superimposed upon the punishment already assessed for other offenses, even though such other punishment was imposed in the form of successive sentences. The lower court's construction might find

at least technical justification if the statute, instead of reading "*any* sentence under which such person is held," used the words "*the* sentence under which such person is held." As it is, considering the history of the statute and its purpose, the words employed are a natural way of expressing the purpose that the sentence imposed for escape while already under sentence shall begin upon the expiration of the aggregate of the terms of imprisonment imposed by the earlier sentences.

The legislative history throws no light on the meaning of the word "held" as used in the last sentence of the statute, and on which the lower court's decision hinges, but the practical context does. The last two sentences of the statute provide for the imposition of punishment for escape or attempted escape in two situations: first, where the escape or attempted escape occurs *prior* to sentence for the original offense, and, second, where the escape or attempted escape occurs *after* sentence for the original offense. In other words, the dichotomy is before and after *sentence*, rather than before and after the beginning of confinement. Thus, the last sentence applies to escapes or attempted escapes occurring *after* the original sentence was imposed, regardless of whether the offender had commenced to serve such original sentence. The last sentence, therefore, applies not only to escapes by prisoners actually serving a prior sentence but also to prisoners who are being held pursuant to con-

viction and sentence. For example, where a sentenced offender attempts to escape while being transported to a Federal penitentiary (without having been confined to await such transportation), the last sentence of the escape statute applies because he is *under sentence* and is held under, or by reason of, such sentence, although he has not yet commenced to serve the sentence.[3] Since the last sentence of the escape statute is thus applicable to escapes both by prisoners serving a prior sentence and by those who, while in custody, have not yet commenced to serve the prior sentence, it was obviously appropriate for Congress to use the word "held" rather than "serving." In fact, if it had referred to the "sentence which such person is serving" or, as it did in the original act, to the sentence for which he "was originally confined," it is possible that the escape statute would be held inapplicable to

[3] The Act of June 29, 1932, c. 310, sec. 1, 47 Stat. 381, 18 U.S.C. 709a, provides that:

"The sentence of imprisonment of any person convicted of a crime in a court of the United States shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of said sentence: *Provided*, That if any such person shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, the sentence of such person shall commence to run from the date on which he is received at such jail or other place of detention. No sentence shall prescribe any other method of computing the term."

a prisoner who escaped or attempted to escape after sentence but before commencing to serve his original sentence. The present language thus avoids the awkwardness of the original statute with respect to offenders who have been sentenced but not yet confined in the institution which is to receive them.

It is apparent, therefore, that the use of the word "held" in the last sentence was both appropriate and deliberate, and that there is no basis whatever for the lower court's assumption that by "held" the Congress meant to refer to the particular sentence which the prisoner was "serving" at the time of the attempted escape.[4]

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[4] The opinion of the court below indicated that it relied upon the following language from *Thomas* v. *Hunter*, 153 F. 2d 834, 837 (C. C. A. 10):

"Furthermore, we think the proviso upon which petitioner relies means that where one is confined and actually serving a prior sentence when he escapes from custody, then the sentence for such escape must be fixed with relation to the expiration date of the prior sentence or with reference to the date on which one is thereafter legally released from confinement thereunder."

Neither the decision in that case, nor the quoted language, has any relevance to the instant case. There, while Thomas was on parole from imprisonment under a prior conviction, he was arrested and indicted for violation of the Dyer Act. Pending his plea to this charge and while in the custody of a marshal, Thomas twice attempted to escape. Eventually, he was sentenced to four years imprisonment on the Dyer Act charge, and to additional sentences of five years each on the two escape charges to run consecutively to each other and to the sentence under the Dyer Act conviction. Relying upon the last sentence of the escape statute, Thomas contended

II

THE DECISION BELOW RENDERS THE ESCAPE STATUTE INAPPLICABLE TO THE PENAL DISCIPLINARY SITUATIONS WHERE IT IS MOST NEEDED

The decision of the Circuit Court of Appeals leads to results which it is hard to believe were intended by the Congress. We have pointed out that escape and attempted escape are often crimes of violence which menace the lives of the custodial officers. They bear no particular relationship to the crime or crimes for which the offender is in custody at the time of the escape or attempted escape. Rather, escape and attempted escape are prescribed and punished as crimes to preserve penal discipline.

Under the decision below, the Congressional purpose would be frustrated, in part at least, in every situation where an escape is effected or attempted during the prisoner's service of any but the last of two or more consecutive sentences.

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that the two escape sentences should run from the completion of his original sentence (from which he had been paroled) rather than from the completion of the sentence for the Dyer Act violation. The Tenth Circuit Court of Appeals rejected this contention on the ground that "If one is out on parole he is not held under the sentence." In so doing, the Tenth Circuit was applying the rule of *Zerbst* v. *Kidwell*, 304 U. S. 359, as to the effect of parole upon the running of a sentence, and it was in this context that the quoted language was used. In fact the sentence following the quoted language from the *Thomas* opinion is as follows: "It [the last sentence of the escape statute] has no application where one is out on parole when he escapes from custody."

Indeed, that purpose would be completely nullified in all cases where the consecutive sentences which the prisoner has not yet begun to serve aggregate five years or more, since, according to that decision, even if the five-year maximum sentence is imposed for the escape, it must necessarily run concurrently with such unserved aggregate. For example, where a prisoner who has been sentenced to two consecutive terms of one and five years, effects or attempts escape during the service of the first or one-year term, a judge would be powerless under the decision below to increase the duration of the prisoner's total period of incarceration, since the escape sentence would necessarily commence upon the expiration of the one-year sentence and could not possibly exceed in duration the second of the two original sentences, with which it would run concurrently.

Perhaps a more striking illustration of the nullification of the Congressional purpose achieved by the decision below would be a situation where a prisoner has been sentenced to, say, three five-year consecutive terms. If he should effect or attempt escape during his service of either of the first two of such terms, it would be utterly beyond the power of the judge imposing sentence for the escape to lengthen the total period of the prisoner's confinement. More than that, the number of times the prisoner effected or attempted escape during the first two of his consecutive sentences

would be immaterial so far as the power to increase the period of his confinement was concerned. Thus, the prisoner, secure in the knowledge that no judge could increase the period of his imprisonment as a penalty for attempted or effected escape, could, with impunity, make or attempt any number of jail breaks, provided only that they occurred during the first 10 years of his 15-year period of detention. It would be only during the last five years that an attempted escape would be at the risk of having his prison term extended. To an impecunious offender, who had little fear of the $5,000 fine that might be imposed for each attempted escape, the only practical inducements against repeated attempts to escape during the first 10 years of such a 15-year term would consist of fear of losing his good-time allowances and the opportunity for parole—inducements which in the past have not always been sufficient to prevent offenders from seeking by escape the immediate freedom they desire. The effect of the decision below, therefore, is to place a premium on escape attempts in all such situations as we have suggested, since the prisoner would have virtually nothing to lose by such an attempt, and his liberty to gain.

A second anomalous result achieved by the holding below is that, whereas a sentencing court may direct that a sentence for any offense other than that of escape shall begin at the expiration of the aggregate term of two or more consecutive

sentences theretofore imposed, it may not do so for the offense of escape—the one offense which Congress unmistakably intended should be subject to separate and additional punishment. Such a result emphasizes the error of a construction of the escape statute which is contrary to the Congressional purpose and is not required by the language employed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

Brief in opp'n to petition not printed

No. 100

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

JIMMIE IRA BROWN,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT, JIMMIE IRA BROWN

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Opinions Below

Opinions of Trial and Appellate Court

The opinion of the Federal District Court for the Western District of Missouri is reported at 67 F. Supp. 116 (R. 22-27). The opinion of the United States Circuit Court of Appeals (R. 31-36) is reported at 160 F. (2d) 310.

Jurisdiction

The judgment of the Circuit Court of Appeals (R. 36) was entered April 4, 1947, and the petition for rehearing (R. 37-40) was denied April 25, 1947 (R. 40). The petition

for writ of certiorari was filed May 23, 1947, and was granted October 13, 1947 (R. 42). The Court's jurisdiction is invoked by petitioner under Section 240a of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented

On October 26, 1945, respondent, Jimmie Ira Brown, had entered against him, for separate offenses to which he had pleaded guilty, three separate sentences, as follows: (1) a one-year sentence which provided that it was to begin on October 26, 1945; (2) a two-year sentence; and (3) a two-year sentence, the second sentence to begin at the expiration of the first sentence, and the third sentence to begin at the expiration of the second sentence. Shortly thereafter, respondent, while being transported to the Federal penitentiary at Leavenworth, Kansas, and while serving the one-year sentence, attempted to escape custody of the Federal marshal. To this charge of attempted escape he pleaded guilty and was sentenced to a five-year term therefor.

The question presented is whether or not that portion of the Federal Escape Act (18 U. S. C. A. 753h) providing ". . . if such person be under sentence at the time of such offense, the sentence imposed hereunder shall begin upon the expiration of, or upon legal release from, any sentence under which such person is held at the time of such escape or attempt to escape," requires said five-year sentence for attempting to escape to begin no later than the expiration of or legal release from the one-year sentence respondent was held under and serving at the time of the attempt to escape.

Statutes Involved

The Act of May 14, 1930, c. 274, § 9, 46 Stat. 327, as amended by the Act of August 3, 1935, c. 432, 49 Stat. 513 (18 U. S. C. A. 753h), provides:

> Any person committed to the custody of the Attorney General or his authorized representative, or who is confined in any penal or correctional institution pursuant to the direction of the Attorney General, or who is in custody by virtue of any process issued under the laws of the United States by any court, judge, or commissioner, or who is in custody of an officer of the United States pursuant to lawful arrest, who escapes or attempts to escape from such custody or institution, shall be guilty of an offense. If the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense whatsoever, the offense of escaping or attempting to escape therefrom shall constitute a felony and any person convicted thereof shall be punished by imprisonment for not more than five years or by a fine of not more than $4,000, or both; and if the custody or confinement is by virtue of an arrest or charge of or for a misdemeanor, and prior to conviction, the offense of escaping or attempting to escape therefrom shall constitute a misdemeanor and any person convicted thereof shall be punished by imprisonment for not more than one year or by a fine of not more than $1,000, or both. The sentence imposed hereunder shall be in addition to and independent of any sentence imposed in the case in connection with which such person is held in custody at the time of such escape or attempt to escape. *If such person be under sentence at the time of such offense, the sentence imposed hereunder shall begin upon the expiration of, or upon legal release from, any sentence under which such person is held at the time of such escape or attempt to escape.* (Italics supplied.)

The Act of June 29, 1932, c. 310, § 1, 47 Stat. 381 (18 U. S. C. A. 709a), provides:

> The sentence of imprisonment of any person convicted of a crime in a court of the United States shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail *for service of said sentence: Provided*, That if any such person shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, the sentence of such person shall commence to run from the date on which he is received at such jail or other place of detention. No sentence shall prescribe any other method of computing the term (June 29, 1932, c. 310, Sec. 1, 47 Stat. 381). (Italics supplied.)

Statement

On October 26, 1945, respondent, Jimmie Ira Brown, having previously pleaded guilty to certain offenses charged, which are set out below, was sentenced under two indictments in the United States District Court for the Western District of Arkansas (R. 13-21). The first indictment was in two counts, Count I charging conspiracy to escape; and Count II charging attempted escape (R. 13-15). The other indictment charged a violation of the National Motor Vehicle Act (R. 19).

Respondent was sentenced under the indictments, as follows:

> Criminal Case No. 840, El Dorado, Arkansas, October 26, 1945:
>
> "One (1) year *from this date* on the second count of the indictment in this cause, and for the period of two (2) years on the first count of the indictment, *to begin* at the expiration of the sentence of imprisonment herein adjudged on the second count; making a total of 3 years imprisonment on the indictment in this case." (Italics supplied.) (R. 16.)

Criminal Case No. 839, El Dorado, Arkansas, October 26, 1945:

"Two (2) years, to begin at the expiration of the sentence of imprisonment adjudged on this day by the court against said defendant on the first count of the indictment in Case No. 840" (R. 20).

Immediately following this, respondent was committed to jail at El Dorado, Arkansas, to await transportation to the Federal penitentiary at Leavenworth, Kansas. On November 8, 1945, respondent, while being transported to this prison, attempted to escape from the custody of the United States marshal for Arkansas. This attempt to escape occurred in the State of Missouri, and an indictment was returned against him, charging a violation of Sec. 753h, Title 18, U. S. C. A. (R. 1). On a plea of guilty to that charge, he was sentenced on January 17, 1946, to the custody of the Attorney General of the United States, for confinement for a period of five years (the maximum number of years provided for under the statute), the term of the sentence ". . . to begin at the expiration of any sentence he is now serving *or to be served* which was *imposed* prior to this date . . ."[1] (R. 3) (italics supplied).

Respondent, in proper time, moved to vacate or correct this five-year sentence imposed upon him by the United States District Court for the Western District of Missouri, contending in his motion that the five-year sentence for attempt to escape should have been made to commence at

[1] "Ordered and adjudged that the defendant, having been found guilty of said offense, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of five (5) years to begin at the expiration of any sentence he is now serving, or to be served which was imposed prior to this date, without costs.

"It is further ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein."

the termination of or expiration of the one-year sentence, that sentence being the first in order of time of the three separate sentences imposed upon him by the United States District Court for the Western District of Arkansas (R. 10-12). The District Court overruled this motion (R. 27). In its memorandum opinion, the trial court held that under the language of the Federal Escape Act, the sentencing court could provide that respondent's sentence for attempting to escape should commence after the expiration of or service of any one or of all of respondent's said three prior sentences.

Respondent, in proper time, appealed from this order to the Circuit Court of Appeals for the Eighth Circuit (R. 29-30), and there renewed his contention that the five-year sentence imposed upon him by the trial court should have been made to commence at the termination of the one-year sentence that he was serving at the time of his attempt to escape (R. 32).

Respondent requested that court to appoint counsel to represent him, and this request was granted (R. 30).

The United States Circuit Court of Appeals for the Eighth Circuit reversed outright the order appealed from, and remanded the cause to the trial court, with directions to correct the five-year sentence imposed for violation of the Federal Escape Act so that it should begin upon expiration of or upon legal release from the sentence under which respondent was serving at the time of his attempted escape, to wit: the one-year sentence imposed by the United States District Court for the Western District of Arkansas (R. 36). In so doing, the court, in its opinion, stated: "The statute seems to be unambiguous, so as to express the intention of Congress . . ." (R. 35).

Petitioner, on April 15, 1947, filed its petition for rehearing (R. 37), and it was denied on April 25, 1947 (R. 40).

Petitioner filed its petition for certiorari on May 23, 1947, and if was granted on October 13, 1947 (R. 42). On that same day, respondent was granted leave to proceed herein in *forma pauperis* (R. 41).

Summary of Argument

The Federal Escape Act provides specifically that a sentence for attempt to escape, as here in question, "shall begin upon the expiration of, or legal release from, any sentence under which such person is held at the time of such escape or attempt to escape." At the time respondent attempted to escape, he was serving one sentence only, and all other sentences imposed upon him were not being served, but were to commence in the future. At the time of the attempt to escape, he was held under the sentence he was then serving, and none other. The intent of Congress as expressed in the Federal Escape Act is that where a person attempts to escape while serving a particular sentence, he is, at the time of such attempt to escape, deemed to be held under that sentence only, and not under other sentences previously imposed but which by their terms are to commence in the future. That this is the intent of Congress is supported by the applicable decisions and the unanimous opinion of the lower court. This is a penal statute, and it is to be strictly construed in favor of the liberty of the citizen. The sentence, if made to commence at the termination of the one-year sentence being served at the time of attempting to escape, satisfies all requirements of the Federal Escape Act, and is in addition to, and independent of, any other previously imposed sentences, within the meaning of the Federal Escape Act. In view of the clearly expressed intent of Congress in the Federal Escape Act, this Court is, in effect, being requested to "legislate" through judicial construction to arrive at a result contrary to the clearly

expressed intent of Congress. If experience now calls for such a change in the Federal Escape Act, the appropriate request therefor should be made to Congress.

ARGUMENT

I

The Federal Escape Act provides specifically the time any sentence thereunder must commence, and this provision completely supports the judgment of the Appellate Court and the position of respondent.

The Federal Escape Act provides specifically the time a sentence thereunder, such as the one in question, must commence. The applicable words are: "The sentence . . . shall begin upon the expiration of, or legal release from, any *sentence under which such person is held at the time of such escape or attempt to escape*" (Italics supplied).

At the time respondent attempted to escape, he was actually serving the one-year sentence imposed upon him by the United States District Court for the Western District of Arkansas. That sentence by its terms provided that it should be for a term of "one year *from this date*" [October 26, 1945]. (Italics supplied.)

Further, Sec. 709a, Title 18, U.S.C.A., provides among other things, that:

> "The sentence of imprisonment of any person convicted of a crime in a court of the United States shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail *for service of said sentence: Provided,* That if any such person shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, the sentence of such person shall commence to run from the date on which

he is received at such jail or other place of detention. No sentence shall prescribe any other method of computing the term" (Italics supplied).

As noted in the statement of facts, respondent was, immediately following the imposition of his one-year sentence, committed to the jail at El Dorado, Arkansas, to await transportation to the Federal prison at Leavenworth, Kansas, so that it conclusively appears both from the terms of that sentence and from the statute set out immediately above, that from the date of the imposition of that first sentence for a one-year term, he was held in custody under and serving that sentence, and none other, at the time he attempted to escape, on November 8, 1945.

All of the other sentences imposed against respondent, by their very terms were not to commence until after the service of or legal expiration of those prior in time, and the five-year sentence for attempting to escape was not to begin until after the expiration of or service of the prior imposed sentences.

That being the fact, beyond dispute, the question is, was respondent being held under any other sentence at the time of his attempt to escape?

Respondent, at the time of his attempt to escape, was serving only one sentence, and his other sentences were to commence only after that sentence ended. He could not at that time, under such circumstances, be deemed to be held under any *sentence* which was to *commence* in the distant future. When he was actually serving a sentence, as is the case here with regard to the one-year sentence, he was held under that sentence. He was not at that time held under any other sentence.

Petitioner's argument is unsound, in that petitioner claims that because there were three sentences (although each is entirely separate from the others), and because each

sentence was to commence as soon as the preceding one ended, respondent was being held under all three sentences *at the time he attempted to escape.* Petitioner, in effect, attempts to construe three separate sentences as one continuous sentence. In so doing, petitioner has overlooked the fact that the Federal Escape Act specifically provides one rule to be applied where a person attempts to escape from lawful custody before conviction, and an entirely different rule that is to be applied if he is serving a sentence at the time of the attempted escape. In the former case, *Congress has provided* that the sentence for the attempted escape may be concurrent with any sentence previously imposed for any other crime. *Rutledge* v. *U. S.*, 146 F. 2d 199. In the latter case, however, *Congress has provided* that the sentence must be consecutive to and must begin upon termination of or expiration of the sentence under which he is held at the time of the attempt to escape. Respondent, in fact, at the time of his attempt to escape, was being held under the sentence he was serving, and as soon as that sentence ended, he could, and, of course, then for the first time would be held under the next sentence, if, meanwhile, it was not voided or changed. At the termination of the first sentence, there would be a technical change of sentence and custody, even though it might be that, as a practical matter, respondent would not enjoy any personal freedom between these separate sentences. The fact that sentences are cumulative does not and should not permit petitioner to treat them as one sentence.

Petitioner in its brief attempts to, at least in effect, rewrite the Federal Escape Act so as to make it read in its application: "The sentence imposed hereunder shall begin upon the expiration of the *aggregate* of all sentences previously imposed against the convicted person." Had Congress actually intended this, it would have said so clearly, just as it specifically did in the Federal statute governing

good-conduct commutations, wherein Congress used the words, "aggregate of his several sentences" (18 U.S.C.A. § 710). Note also the case of *Anderhold* v. *Hudson*, 84 F. 2d 559, wherein the court distinguishes the words and meaning of the Federal Escape Act from those of the Good-conduct Commutation Act, and specifically refutes any theory of aggregation of time applying so as to include sentences under the Federal Escape Act. Petitioner in its brief mentions the statute governing good-conduct commutations and also one concerning paroles. It is extremely noteworthy that in both of those statutes Congress had no difficulty in selecting words such as "the aggregate of his several sentences" and similar phrasing that clearly and beyond any doubt indicated the intention of Congress therein. In the Federal Escape Act, Congress could have used and would have used words such as those indicated above, instead of using words with exactly the contrary meaning, if Congress had intended the result contended for by petitioner. Whenever consecutive sentences were treated in the aggregate for any particular purpose, the statute involved specifically provided for such treatment.

Petitioner, through argument, having attempted to add the word "aggregate" to the Federal Escape Act, would then remove the words "under which such person is held at the time of such . . . attempt to escape," and insert in lieu thereof words of this import: "which have been made (imposed) prior to the attempted escape." When Congress used the word "*held*" in a highly penal criminal statute, it intended that such word be construed strictly, and as a word of art, and not otherwise.

One can escape only from legal custody. Legal custody requisite for escape from being held under a sentence exists only when the custodian has the right *under the particular sentence* to the possession of the prisoner. There was only one sentence, to-wit, the one-year sentence im-

posed in Case No. 840, under which the right to such legal custody existed at the time of the attempted escape. Respondent was not actually restrained of his liberty by virtue of any sentence but that one. Had respondent sought a writ of habeas corpus by virtue of any alleged defect in any of the sentences imposed upon him, other than the one year sentence, he would have been denied the writ for the reason that he was not yet actually held in custody by virtue of such sentences or restrained of his liberty by virtue of them, and thus would have been premature in seeking that relief. *McMahan* v. *Hunter*, 150 F. 2d, 498, and cases cited therein.

Petitioner in its brief focuses attention on the word "any", as appears in the Federal Escape Statute, and argues that it means any and all sentences which may have been *imposed*. Although a sentence may be imposed, it does not necessarily follow that at the particular time in question a person is *held* under it. If held at all, he may be held under some other sentence or some other lawful restraint. A sentence may be imposed to commence in the future. Further, the word "any" is susceptible of many meanings and shades of meanings. It has often been held to mean "any and all." It has just as often been held to mean "any" in the sense of one. When used in a statute it is restricted in its meaning to the context of the statute, and this is particularly true when it is used in a criminal statute. *United States* v. *Wiel*, 46 F. Supp. 323, 326.

The Federal Escape Statute contains the words "any sentence" and not "any sentences", and further limits its provisions by the words "under which such person is held at the time of such escape or attempt to escape." The reason for the use of the word "any" in the statute is understandable. The person may be *serving* two sentences concurrently, as, for example, a sentence for one year and also a sentence for two years' imprisonment. Since that person would simultaneously and concurrently be *serving*

both sentences, the word "any" becomes necessary. Otherwise it would not be clear whether the sentence for the unlawful attempt to escape should begin at the end of the one year sentence or at the end of the two year sentence that is being *concurrently served*. And, obviously, since the person would be serving both sentences concurrently, he would be deemed to be *held* under both sentences. To remove any possible confusion Congress worded the language of the Federal Escape Act so as to require the sentence for the attempt to escape to begin *after any sentence under which the person is actually held in custody at the time he escapes or attempts to escape that custody*. This example is readily distinguishable from the instant case, because respondent was not serving concurrent sentences at the time he attempted to escape. At that particular time he was held under the only sentence he was then serving, and none other.

II

Respondent's sentence if made to commence at the termination of the previously imposed one year sentence, would satisfy the requirements of the Federal Escape Act that the sentence be in addition to and independent of certain previously imposed sentences.

Respondent's sentence if made to commence at the termination of the previously imposed one year sentence, would satisfy the requirements of the Federal Escape Act that the sentence be in addition to and independent of certain previously imposed sentences. In *Rutledge* v. *United States*, 140 F. 2d 199, the Circuit Court of Appeals for the Fifth Circuit stated that a sentence meets the requirement of being in addition to, and independent of, other sentences where such sentence was a separate sentence under a separate indictment. As there pointed out, such a sentence is in all

respects a complete sentence within itself. Had any other sentence previously imposed been voided, this sentence would not have been vitiated or otherwise affected thereby. Further, the mere fact that the respective sentences were to begin at the same time would not alter the fact that the sentence for attempted escape was separately and additionally imposed and that it was wholly independent of the others.

As stated in the case of *Rutledge* v. *United States, supra,* in approaching the meaning of Congress in this statute the judiciary must apply the established rule that criminal statutes must be construed favorably to the liberty of the citizen. There was no intent on the part of Congress, according to the case of *Rutledge* v. *United States, supra,* in requiring a separate sentence in the Federal Escape Act to eliminate any possibility of the sentence for the unlawful attempt to escape to run concurrently with other sentences that had been imposed.

III

All applicable authority leads inescapably to the conclusion that the sentence in question must commence at the expiration of, or legal release from, the sentence respondent was serving at the time of the attempted escape.

Although the question presented herein is in a sense one of first impression, the principle of law directly involved has been intentionally and advisedly declared in the case of *Thomas* v. *Hunter* (C. C. A. 10, 1946), 153 F. 2d 834. The facts there presented were that, on October 16, 1941, while Thomas was out on parole from a sentence previously imposed, he was arrested, and on November 13, 1941 was indicted for having violated the Dyer Act. On November 21, 1941 and again on November 8, 1942 he attempted to escape. Thomas pleaded guilty to the Dyer Act charge and

was sentenced to four years' imprisonment. He was given a trial on the two escape charges, and on being found guilty thereof was sentenced to five years' imprisonment on each of the two charges. The two sentences for violating the Federal Escape Act, and the Dyer Act sentence were to run consecutively, for a total of fourteen years' imprisonment and were to begin after the Dyer Act sentence had been served. Thomas argued that the two sentences for violating the Federal Escape Act were void because they had to commence at once and not upon the expiration of, or legal release from, the Dyer Act sentence. He reasoned that he was being held under the sentence for which he was out on parole at the time he attempted escape, and thus the sentences for the unlawful attempted escapes should begin when that sentence ended. The Court ruled that Thomas was not being *held under any sentence* at the times he attempted to escape because at such times he was out on parole from his previous sentence, and that, therefore, the court could make the two sentences for the attempted escape concurrent with any of his sentences, or could make such sentences consecutive to any such sentence, as it did. The court impliedly ruled that if it had been found, as a matter of law, that Thomas was being held *under a particular sentence* at the times of the attempted escapes, any sentences for the attempted escapes must begin after such sentence under which he was held at the times of the attempted escapes had expired or terminated. The court said (l. c. 837):

> "In Zerbst *v.* Kinwell, 304 U. S. 359, 59 S. Ct. 872, 8 L. Ed. 1299, 116 A. L. R. 808, the Supreme Court held that where one who was on parole or probation committed another offense for which he was arrested and sentenced, while he was incarcerated under the latter sentence he was imprisoned only thereunder, and the service of the original sentence was interrupted and

the running of such sentence began again only at the completion of the new sentence. It was held that during the time he was serving the new sentence he was no longer in either actual or constructive custody under the first sentence. From this it follows that when appellant was arrested for the Dyer Act violation, the original sentence was interrupted and suspended. The original being suspended, he was not under that sentence when he broke jail. Petitioner not having been under the original sentence at the time he broke jail, it follows that when the court passed the sentences for the jail break, the provision of the statute which he seeks to invoke did not apply to him.

Furthermore, we think the proviso upon which petitioner relies means that where one is confined and actually serving a prior sentence when he escapes from custody, then the sentence for such escape must be fixed with relation to the expiration date of the prior sentence or with reference to the date on which one is thereafter legally released from confinement thereunder. It has no application where one is out on parole when he escapes from custody. The words of the statute are: 'The sentence imposed hereunder shall begin on expiration of, *or upon legal release from*, any sentence *under which such person is held at the time of such escape*. * * *' If petitioner's construction of the statutory proviso were correct, then the phrases 'or upon legal release' and 'under which such person is held at the time of such escape' would be meaningless and would be mere surplusage. If one is out on parole he is not held under the sentence."

Thus, by the very language of the *Thomas* case, "during the time he was serving the new sentence he was no longer either in actual or constructive custody under the first sentence." Applying that principle to the present case, obviously respondent at the time he attempted to escape was then serving the one-year sentence only and was not in either actual or constructive custody under any other

sentence. The court construes the Federal Escape Statute provisions so as to require one to be held in either actual or constructive custody under a sentence and does not concern itself with the question of whether or not a sentence has been *imposed*. The court ruled that the provision of the Federal Escape Statute which petitioner seeks to invoke does not apply unless at the time the person attempts to escape he is being held in custody under the sentence or sentences in question. It held that if one is out on parole at the time he attempts to escape, he is not held in custody under the sentence even though the sentence has been imposed against him and even though his parole may be later revoked so that at some future date he may have to complete serving that sentence.

In *Rutledge* v. *United States*, 146 F. 2d 199, the Court restates that portion of the Federal Escape Act in which we are interested (18 U. S. C. A., Sec. 753(h)) as follows:

> "It further provides that if a person is under sentence at the time of the offense, the sentence imposed for the escape shall begin at the expiration of or legal release *from the sentence being served.*" (Italics supplied.)

The court's ruling refutes petitioner's contention that this escape sentence must follow the aggregate of all sentences imposed previous to the sentence for the wrongful escape or attempt to escape, and holds that it can be concurrent therewith, as he was not at the time he attempted to escape then under any sentence, but only under arrest and in custody.

In *McMahan* v. *Hunter*, 150 F. 2d 498, the facts were that McMahan previously had been convicted of a violation of the Dyer Act and sentenced to serve three years therefor. Thereafter, he was convicted on two separate escape charges and sentenced to two years' imprisonment on each

charge under the Federal Escape Act. All sentences were to be consecutive for a total of seven years' imprisonment. McMahan sought a writ of *habeas corpus.* The court refused the writ as to the two escape sentences, saying (l. c. 500):

> "* * * we must therefore (acknowledge) assume that he is now in the custody of the respondent by virtue of the Oklahoma sentence and will be until February 3, 1946 * * *." (The writ is refused because) "petitioner was not *actually restrained of his liberty by virtue of them,* but was in lawful custody of the respondent by force of a valid judgment of the Oklahoma court. The writ may not be used as a means of securing the determination of a judicial question, which if determined in petitioner's favor, will not result in his immediate release." (Italics supplied.)

Respondent submits that this can only mean that where one is actually restrained of his liberty or is in lawful custody only under one sentence which he is then actually serving, he is not deemed to be held under any sentence which by its own terms is to commence in the future. Since respondent was actually serving a sentence at the time he attempted to escape, and all other sentences involved were to commence in the future, he was held only under the sentence that he was serving at the time that he made the attempt to escape.

In *Lyons* v. *Squire,* 54 F. Supp. 557, an erroneous attempt was made to have a sentence imposed for wrongful escape run concurrently with another sentence which the defendant had yet to complete serving because he had forfeited his deduction for time off for good behavior. The court stressed the point that the sentence under the Federal Escape Act is a separate and independent sentence, and by the terms of the Act itself could not be served concurrently

with the latter part of the sentence he was actually serving at the time he escaped. As the court there said (l. c. 559):

> "To hold otherwise would be * * * to nullify the provisions of the Act that require an independent sentence to be served only upon the expiration of the *sentence from which such prisoner made an escape.*" (Italics supplied.)

The above case is not mentioned in petitioner's brief. Respondent submits that the language quoted has the meaning that a sentence which one is actually serving and actually in confinement under is the one under which he is held. Otherwise it could not be the "sentence from which such prisoner made an escape." To relate this to the Federal Escape Act the respondent contends that where one is actually serving a sentence at the time he attempts to escape, and serving no other, the word "held" as used therein means held under that particular sentence and none other.

The case of *Gambill* v. *Aderhold*, 4 F. Supp. 567, concerns the language of the Federal Escape Act as originally enacted in May, 1930. In that decision the Court specifically ruled that a person will be received at a penitentiary for service of a sentence for wrongful escape only after he has served the original sentence from which he attempted to escape. It recognizes that unless a prisoner is under concurrent sentences he can be deemed to be serving only one of them at the particular time of the attempted escape.

Thus all of the authority which appears helpful leads to the conclusion that the five-year sentence for violation of the Federal Escape Act must begin at the expiration of or legal release from the one-year sentence which respondent was actually serving at the time of his attempt to escape.

Much of petitioner's argument is directed to a situation other than the one now before this Court and which is in

fact far different from it. Petitioner, for argument's sake, assumes a fictional situation where a sentence has been imposed but the defendant has not yet begun serving the sentence. It is difficult to imagine how as a practical matter this fictional situation might arise in view of the actual practice of the Courts to either make the sentence commence at once (as was done in this case) or to commit the person to jail to await transportation to a penal institution so as to come within the terms of 18 U. S. C. A., Sec. 709(a), set out *supra* in this brief. However, even if such situation did ever arise, respondent asserts that the provisions of the present Federal Escape Act would make such attempt to escape a crime within the meaning of that Act and that the punishment provided therein would then be applicable. The Federal Escape Act in effect covers four different situations, to-wit:

(1) Any person who has been committed to the custody of the Attorney General or his authorized representative;

(2) Or who is confined in any penal or correctional institution pursuant to the direction of the Attorney General;

(3) Or who is in custody by virtue of any process issued under the laws of the United States by any court, judge or commissioner;

(4) Or who is in custody of an officer of the United States pursuant to lawful arrest.

Since petitioner's fictional example is different from the situation now before this Court, respondent does not believe it appropriate to enter into argument upon a moot question that does not bear directly upon his own situation. Suffice it to say that in the fictional example given by petitioner the act of the person attempting to escape would be in violation of the terms of the Federal Escape Act and it would then be up to the Court to determine whether or not such

person at the time of the attempt to escape was being held under some order of the Court or under lawful arrest or possibly under the sentence which had been imposed. Respondent doubts that a court would find that such person was being held under the sentence that had been imposed but had not commenced. However that would depend upon the precise factual situation before the court and involve the question of whether or not the petitioner at such exact time might not be held in custody under the lawful arrest or some other order. Obviously prior to the actual imposition of the sentence the person would be held in lawful custody by virtue of some process or order and he would probably continue to be held in custody under that process or order until the actual commencement of his sentence (or until he came within the terms of 18 U. S. C. A., Sec. 709 (a), which is tantamount to the commencement of the serving of the sentence).

IV

This Court is in effect being requested to legislate so as to secure a result contrary to the present statutory provision contained in the Federal Escape Act, and Congress is the appropriate place for such request.

Prior to the enactment of the original Federal Escape Act on May 14, 1930 (c. 274, § 9, 46 Stat. 327) it was not a crime against the United States to escape from or to attempt to escape from a penal institution or while serving a Federal criminal sentence. No matter how desirable it may have seemed to Federal enforcement officers to have a person punished by a penal sentence for escaping or attempting to escape, Congress had not made it a Federal offense and it could not be dealt with as such. And this, because there are no common law criminal offenses against the United States. This Court has always upheld that fundamental constitutional principle. As originally enacted

on May 14, 1930, the Federal Escape Statute was considerably limited in scope and dealt only with escapes or attempts to escape by persons who had been convicted of some offense and were under sentence at the time of the escape or attempt to escape.[2] Obviously at that time and until August 3, 1935 the wording of this relatively new statute did not apply to a person being lawfully held in actual custody but who prior to the imposition of a sentence escaped or attempted to escape from such custody. Again, enforcement officers may have felt strongly that such conduct should be subject to punishment by a similar sentence. However, Congress had not provided that such conduct could be punished, and no resort was made to any court to "legislate" to bridge what enforcement officials felt was a "gap" or omission in the statute. Instead, and properly, on August 3, 1935 (c. 432, 49 Stat. 513) Congress was requested to and did amend the Federal Escape Act to cover this "gap" which experience under the Act had proved to enforcement officials needed to be covered, and who in turn convinced Congress of the desirability of covering the omission.

Further, the Federal Escape Act, as now written, has a specific provision which states exactly when, under the situation now before this Court, a sentence for the crime of attempting to escape shall commence. Congress has spoken on that precise subject. If experience under the Federal

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[2] Sec. 9. Any person properly committed to the custody of the Attorney General or his authorized representative or who is confined in any penal or correctional institution, pursuant to the direction of the Attorney General, who escapes or attempts to escape therefrom shall be guilty of an offense and upon apprehension and conviction of any such offense in any United States court shall be punished by imprisonment for not more than five years, such sentence to begin upon the expiration of or upon legal release from the sentence for which said person was originally confined.

Escape Act as now written by Congress leads enforcement officials to the conclusion that trial judges should have authority to make sentences for attempt to escape commence at the end of the aggregate of all sentences that may have been imposed against a person prior to the attempt to escape, then the result of that experience should be placed before Congress with the request that the statute be appropriately amended. Instead, the argument is now advanced that because such result now seems desirable to petitioner this Court should in effect read that result out of the specific provisions of the Federal Escape Act, the very words of which provide the contrary. As succinctly stated in *Viereck* v. *United States*, 318 U. S. 236, by Chief Justice Stone speaking for this Court: "The unambiguous words of a statute which imposes criminal punishment are not to be altered by judicial construction so as to punish one not otherwise within its reach, however deserving of punishment his conduct may seem."

This Court has always construed penal statutes strictly in favor of the accused; *Rutledge* v. *United States*, 146 Fed. (2d) 199; *Viereck* v. *United States, supra; Smith* v. *United States*, 145 F. 2d 643 (Cert. Den. 323 U. S. 803). In the latter case, *Smith* v. *United States*, the case of *Holmes* v. *United States*, 267 Fed. 529, was approved. The *Holmes* case is authority for the long recognized principle that a criminal statute must be definite and certain in respect to the punishment it is intended to impose. As said therein, l. c. 531: "It is undoubtedly the law that a valid criminal statute should be certain in its terms, and not leave uncertain the acts intended to be prohibited or the punishment to be inflicted thereunder. The punishment in the event of conviction must be as certain as any other provision of the statute. 16 C. J., 68."

Conclusion

For the reasons and authorities heretofore mentioned, it is respectfully submitted that the unanimous judgment of the Eighth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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(3892)

SUPREME COURT OF THE UNITED STATES

No. 100.—October Term, 1947.

The United States of America, Petitioner, v. Jimmie Ira Brown.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[February 2, 1948.]

Mr. Justice Rutledge delivered the opinion of the Court.

The Federal Escape Act requires that a sentence for escape or attempt to escape "shall begin upon the expiration of, or upon legal release from, any sentence under which such person is held at the time of" the escape or attempt.[1] The narrow question is whether the Act re-

[1] The Act is as follows: "Any person committed to the custody of the Attorney General or his authorized representative, or who is confined in any penal or correctional institution pursuant to the direction of the Attorney General, or who is in custody by virtue of any process issued under the laws of the United States by any court, judge, or commissioner, or who is in custody of an officer of the United States pursuant to lawful arrest, who escapes or attempts to escape from such custody or institution, shall be guilty of an offense. If the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense whatsoever, the offense of escaping or attempting to escape therefrom shall constitute a felony and any person convicted thereof shall be punished by imprisonment for not more than five years or by a fine of not more than $5,000, or both; and if the custody or confinement is by virtue of an arrest or charge of or for a misdemeanor, and prior to conviction, the offense of escaping or attempting to escape therefrom shall constitute a misdemeanor and any person convicted thereof shall be punished by imprisonment for not more than one year or by a fine of not more than $1,000, or both. The sentence imposed hereunder shall be in addition to and independent of any sentence imposed in the case in connection with which such person is held in custody at the time of such escape or attempt to escape. If such person be under sentence at the time of such offense, the sentence imposed hereunder shall begin upon the expiration of, or upon legal release from, any sentence under which such person is held at the time of such escape or attempt to escape." 49 Stat. 513, 18 U. S. C. § 753h.

quires that a sentence for attempt to escape shall begin upon the expiration of the particular sentence being served when the attempt occurs or at the expiration of the aggregate term of consecutive sentences then in effect, of which the one being served is the first.

The facts are these. Respondent was charged under two indictments in the District Court for the Western District of Arkansas. One contained two counts, the first charging conspiracy to escape, the second attempt to escape. The other indictment was for violation of the National Motor Vehicle Theft Act. 41 Stat. 324, 59 Stat. 536. Respondent pleaded guilty to all three charges. On October 26, 1945, he was sentenced as follows: under the first indictment charging the escape offenses, imprisonment for one year on the second count, and for two years on the first count, the sentences to run consecutively in that order; under the motor vehicle theft indictment, imprisonment for two years, to run consecutively to the other two. Thus the aggregate of the three consecutive sentences was five years.

On November 2, 1945, respondent was serving the one-year term of the first sentence as ordered by the court. On that date he was being transported in custody of a United States marshal from an Arkansas jail to Leavenworth Penitentiary in Kansas.[2] During the journey's progress through Missouri he attempted to escape. This resulted in another indictment, in the Western District of Missouri, to which also respondent pleaded guilty. The District Court sentenced him to imprisonment for five years, the term "to begin at the expiration of any sentence he is now serving, or to be served which was imposed prior to this date . . . ."

[2] The sentence began to run as of the time respondent was committed to jail to await transportation to the Leavenworth penitentiary. 47 Stat. 381, 18 U. S. C. § 709a.

Respondent filed a motion to correct this last sentence. He contended that at the time of the last attempt he was being "held," within the meaning of the last sentence of the Federal Escape Act, only under the one-year sentence pronounced in the Western District of Arkansas, and that the Act required the five-year sentence under the indictment returned in Missouri to commence at the expiration of that one-year term.

The District Court overruled the motion. It held that under the statute the sentencing court could order that the sentence begin to run after the service of any one or all of respondent's three prior sentences. 67 F. Supp. 116. The Circuit Court of Appeals, however, reversed the judgment. Relying on the canon of strict construction of criminal statutes, it equated the statutory word "held" to "serving," and concluded that a sentence for escape or attempt to escape must begin at the expiration of the particular sentence which the prisoner is serving at the time the escape or attempt occurs. Accordingly the court remanded the cause to the District Court with directions to correct the five-year sentence so that it would begin upon expiration of or legal release from the one-year sentence. 160 F. 2d 310. We granted certiorari because of the importance of the question in the administration of the Federal Escape Act.

Although prison breach or other escape by prisoners from custody was a crime under the common law,[3] there was no federal statute proscribing such conduct prior to the enactment of the original Federal Escape Act in 1930, 46 Stat. 327. That Act dealt only with escape or attempted escape while under sentence. It was enacted as part of a program sponsored by the Attorney General for the reorganization and improved administration of the federal penal system. H. R. Rep. No. 106, 71st Cong., 2d

[3] Miller, Criminal Law 463–465.

Sess. The Act took its present form in 1935, when it was broadened at the Attorney General's request [4] to cover escape while in custody on a federal charge prior to conviction.[5]

The legislation reflects an unmistakable intention to provide punishment for escape or attempted escape to be superimposed upon the punishment meted out for previous offenses. This appears from the face of the statute itself. It first provides that persons escaping or attempting to escape while in custody, whether before or after conviction, shall be guilty of an offense. Then follow provisions for determining whether the offense shall be a felony or a misdemeanor, with corresponding prescriptions of penalties.

At this point the statute had no need to go further if the intention had been merely to leave to the court's discretion whether the penalties, within the limits prescribed, should run concurrently or consecutively in accordance with the generally prevailing practice. On that assumption the statute was complete, without addition of the last two sentences. But in that form the Act would have left the court with discretion to make the sentence run concurrently or consecutively with the other sentences previously in effect or put into effect in the case or cases pending when the escape occurred.

Precisely to avoid this more was added, in the explicit provisions that "the sentence imposed hereunder *shall be*

[4] H. R. Rep. No. 803, 74th Cong., 1st Sess.; S. Rep. No. 1021, 74th Cong., 1st Sess.

[5] The Government's brief aptly summarizes some of the more serious considerations leading to adoption of the original and amended acts, as follows: "Escapes and attempted escapes from penal institutions or from official custody present a most serious problem of penal discipline. They are often violent, menacing, as in the instant case, the lives of guards and custodians, and carry in their wake other crimes attendant upon procuring money, weapons and transportation and upon resisting recapture."

in addition to and independent of any sentence imposed in the case in connection with which such person is held in custody at the time of such escape or attempt to escape. If such person be under sentence at the time of such offense, the sentence imposed hereunder *shall begin upon the expiration of, or upon legal release from, any* sentence under which such person is held at the time of such escape or attempt to escape." (Emphasis added.)

These sentences foreclosed, and were intended to foreclose, what the earlier portions of the Act had left open, namely, the court's power to make the escape sentence run concurrently with the other sentences.[6] Whether the escape was before or after conviction, additional punishment was made mandatory, in the one case by the explicit requirement, "in addition to and independent of" any sentence imposed; in the other by the command that the escape sentence "shall begin upon the expiration of, or upon legal release from, any sentence," etc. The differing verbal formulations were necessary to meet the different "before" and "after" conviction situations. But the two provisions had one and the same purpose, to require additional punishment for the escape offense. The idea of allowing the escape sentences to run concurrently with the other sentences was completely inconsistent with this common and primary object, as well as with the wording of the two concluding clauses. In many cases such concurrent sentences would nullify the statutory purpose altogether; in others, they would do so partially.[7]

Moreover, imposition of such additional punishment had been the prime object, indeed the only one, of the original Escape Act, which was applicable only to escapes

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[6] But see *Rutledge* v. *United States*, 146 F. 2d 199.

[7] Depending on whether the term of the sentence for escape, as of the time of its imposition, is shorter or longer than the periods of the other sentences remaining unserved.

after conviction. It made such escapes or attempts "offenses," punishable by imprisonment for not more than five years, "such sentence to begin upon the expiration of or upon legal release from the sentence for which said person was originally confined."[8] This provision, though differing from the wording of the last sentence of the present Act had the same prime object. Concurrent sentences were as inconsistent with its terms as with those of the present Act, for in many cases like this one they would have added no further punishment in fact.

Congress, it is true, did not cast the original Act in terms specifically relating to a situation comprehending consecutive sentences existing at the time of the escape or attempt, as more careful drafting of the Act would have required to insure achieving the object of adding independent punishment in all cases. Its concentration upon that main aspect of the legislation apparently led it to reduced emphasis upon and care in the definition of the situations to which the Act would apply.

Nevertheless in view of the Act's broad purpose, it would be difficult to conclude that the original phrasing, "the sentence for which said person was originally confined," was intended to apply only to the sentence, one of several consecutive ones, which the prisoner happened to be serving when the escape or the attempt occurred, or that the Act would be effective only where the prisoner was serving time under a single sentence, which was per-

[8] The Act was as follows: "Any person properly committed to the custody of the Attorney General or his authorized representative or who is confined in any penal or correctional institution, pursuant to the direction of the Attorney General, who escapes or attempts to escape therefrom shall be guilty of an offense and upon apprehension and conviction of any such offense in any United States court shall be punished by imprisonment for not more than five years, such sentence to begin upon the expiration of or upon legal release from the sentence for which said person was originally confined." 46 Stat. 327.

haps the more common of the situations which Congress had in mind. The same basic reasons which require rejection of either of those views of the present Act would apply to the original one.

But, in any event, Congress changed the wording of the "after expiration or release" clause in the original statute when enacting the amended one. "The sentence for which said person was originally confined" became "any sentence under which such person is held at the time of such escape or attempt to escape." This change is not without significance. For use of the words "*any* sentence under which such person is *held*" means something more than the narrowest possible construction of "*the* sentence for which said person *was originally confined*," unless the change is to be taken as meaningless. We think it was intended, as were the other amendments made at the same time, to broaden the Act's coverage or to assure its broad coverage,[9] and therefore to include situations where the prisoner was being "held" under more than one sentence. Otherwise there would be no reason for or meaning in the change.

We think therefore that the Act contemplates "additional" and "independent" punishment in both the concluding clauses in a practical sense, not merely in the technical sense of concurrent sentences having no effect to confine the prisoner for any additional time. In a very practical sense, a person in custody under several consecutive sentences is being "held" under the combined sentences. And the legislative language is a natural, though not nicely precise, way of stating the purpose that the sentence for escape shall begin upon the expiration of the aggregate of the terms of imprisonment imposed by earlier sentences. Granted that the present problem could have

[9] Either by eliminating the original wording's ambiguity by rejecting the narrow construction or, if that construction were thought valid, by changing the Act's terms to insure a different result.

been obviated by even more astute draftsmanship, the statute on its face and taken in its entirety sufficiently expresses the congressional mandate that the sentence for escape is to be superimposed upon all prior sentences.

We are mindful of the maxim that penal statutes are to be strictly construed. And we would not hesitate, present any compelling reason, to apply it and accept the restricted interpretation. But no such reason is to be found here. The canon in favor of strict construction is not an inexorable command to override common sense and evident statutory purpose. It does not require magnified emphasis upon a single ambiguous word in order to give it a meaning contradictory to the fair import of the whole remaining language. As was said in *United States* v. *Gaskin*, 320 U. S. 527, 530, the canon "does not require distortion or nullification of the evident meaning and purpose of the legislation." Nor does it demand that a statute be given the "narrowest meaning"; it is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers. *United States* v. *Raynor*, 302 U. S. 540, 552; *United States* v. *Giles*, 300 U. S. 41, 48; *Gooch* v. *United States*, 297 U. S. 124, 128; *United States* v. *Corbett*, 215 U. S. 233, 242.

To accept the decision of the Circuit Court of Appeals would lead to bizarre results. The congressional purpose would be frustrated, in part at least, in every situation where an escape is effected or attempted during the prisoner's service of any but the last of two or more consecutive sentences, possibly even in that instance. Barring intervention of executive clemency, it would be completely nullified in all cases where the consecutive sentences which the prisoner has not yet begun to serve aggregate five years or more. In the latter situation the prisoner could attempt any number of jail breaks with impunity. A court would be powerless to impose added confinement for violation of the Escape Act.

The holding of the Circuit Court of Appeals thus places it beyond the power of the judge to superimpose additional imprisonment for escape in those instances where such punishment is most glaringly needed as a deterrent.[10] There is also this further striking incongruity. The judge is completely interdicted from imposing an additional sentence for escape or attempt to escape, the one type of offense which Congress unmistakably intended to be subject to separate and added punishment, although he may direct that a sentence for any other federal offense shall begin at the expiration of consecutive sentences theretofore imposed.

No rule of construction necessitates our acceptance of an interpretation resulting in patently absurd consequences. And the absence of any significant legislative history, other than has been related, may be indicative that Congress considered that there was no such problem as is now sought to be injected in the statutory wording or that by the 1935 amendment it had cured the previously existing one. The liberty of the individual must be scrupulously protected. But the safeguards of cherished rights are not to be found in the doctrinaire application of the tenet of strict construction. Neither an ordered system of liberty nor the proper administration of justice would be served by blind nullification of the congressional intent clearly reflected in the Federal Escape Act.

The judgment of the Circuit Court of Appeals is

Reversed.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent.

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[10] The $5,000 fine that could be imposed for each escape attempt, see note 1 *supra*, would be no deterrent to an impecunious offender, and little more than an empty threat to the long-incarcerated one whose all-consuming interest is freedom.